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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1935.

No. 312.

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY, ET AL.,
*Appellants,*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ATLANTIC COAST LINE RAILROAD COMPANY, ET AL.,
*Appellees.*

**ON REARGUMENT.**

## SUPPLEMENTAL BRIEF FOR ATLANTIC COAST LINE RAILROAD COMPANY, ET AL., APPELLEES.

W. N. McGEHEE,
CHARLES CLARK,
JAMES F. WRIGHT,
FRANK W. GWATHMEY,
*Attorneys for Atlantic Coast Line R. R. Co., et al., Appellees.*

February 25, 1936.

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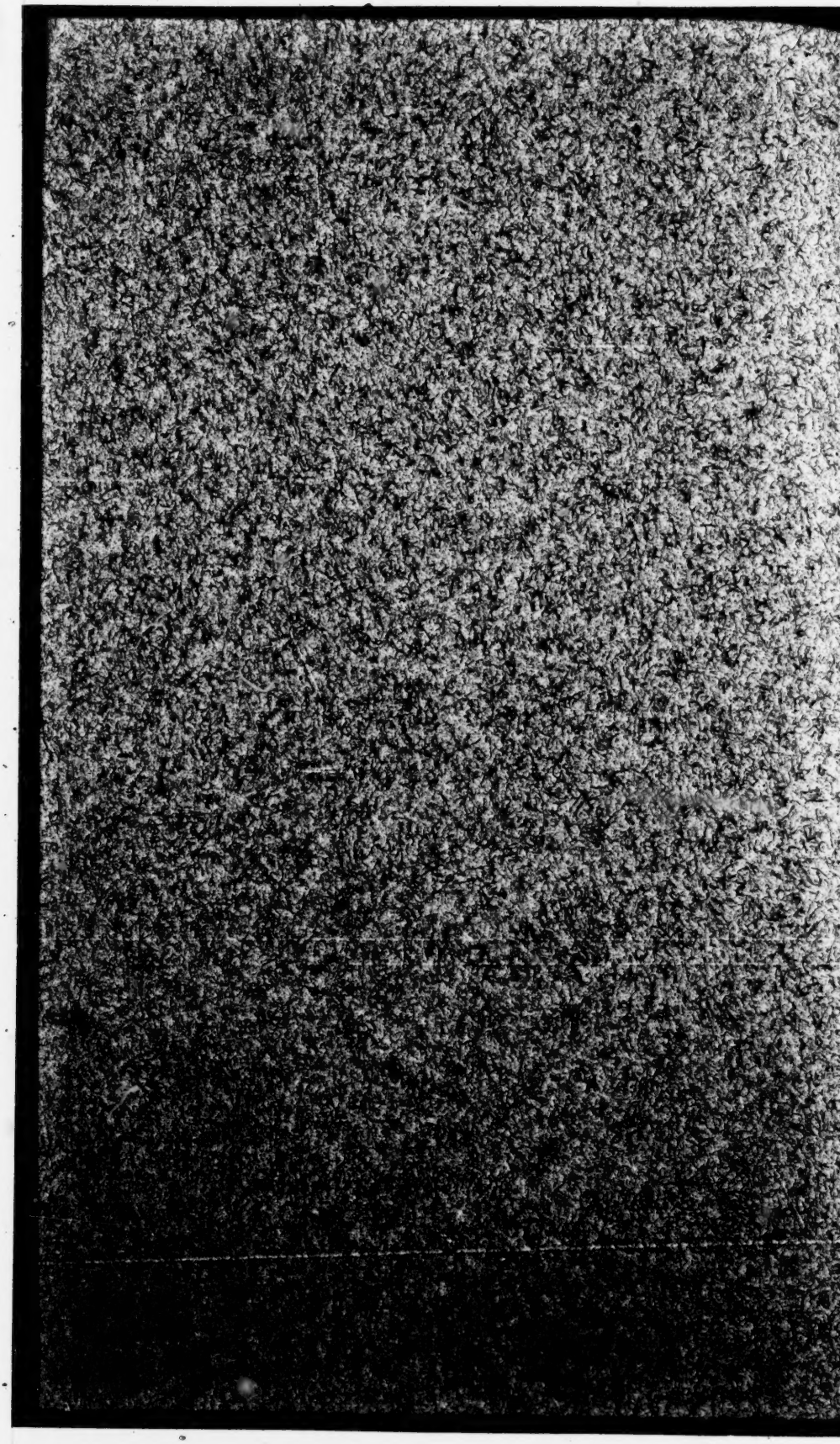

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## SUPPLEMENTAL BRIEF FOR ATLANTIC COAST LINE RAILROAD COMPANY, ET AL., APPELLEES.

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### Preliminary Statement.

There are outstanding and important facts of record in this case of which a clear comprehension is essential to an understanding of both the basis and the measure of the

Commission's prescribed divisions. It is essential also to an understanding of the reasons for the District Court's conclusion that the divisions prescribed for the northern roads, the appellants here, are neither confiscatory nor arbitrary and accordingly dismissing the bill. These facts, we believe, were not adequately placed before the Court on the original argument nor was it practicable to do this within the reasonable and necessary time limit of such argument.

With the purpose of avoiding duplication, the southern roads respectfully ask leave on this reargument to rely primarily upon their original brief, dated December 12, 1935, for a statement of the issues on this appeal and the general position of these carriers. There are summarized in the former brief (at pp. 21-23) certain of the important facts which were found and stated by the District Court in its opinion. Basically, they are the same facts which were likewise found by the Commission and stated in its two reports (Summarized at pp. 16-17). The purpose of this supplemental brief is to discuss somewhat more fully the facts thus concurrently found by the Commission and the lower court, together with the supporting evidence, particularly in the light of various questions which arose during the course of the former argument.

## I.

## THE FACTS PERTAINING TO THE PARTICULAR CITRUS FRUIT TRANSPORTATION HERE IN QUESTION PRECLUDE THE USE OF SYSTEM AVERAGE UNIT COSTS AS A MEASURE OF THE COST OF THIS CITRUS FRUIT TRANSPORTATION.

In southern lines' former brief under the caption "The Procedure Adopted for Proving Confiscation" (pp. 9-12), it is shown that for this purpose the three original complainants in the District Court, to-wit, the Pennsylvania, the Baltimore & Ohio and the Richmond, Fredericksburg & Potomac, have computed for each system a "system average" unit cost; that the unit selected is the "freight car mile", *i. e.*, the haul of any freight car, whether loaded or empty, a distance of one mile; that for each system they (1) obtain the total number of all "freight car miles" for the year 1929, as reported to the Commission; (2) apportion between freight and passenger operations the total operating expenses, as reported for the same year; and (3) in order to obtain an average, divide total "freight car miles" into total "freight operating expenses", as thus obtained, after first making certain deductions to cover car repairs, retirements and depreciation because citrus fruit moves in refrigerator cars not owned by the railroads (R. 1233-4, 1237-41).

Taking as a test period the 1928-29 shipping season, and certain cars of citrus fruit which moved through Richmond and Potomac Yard during that period, the "system average" unit cost thus obtained is used to represent the citrus fruit cost in computing, per car and in the aggregate, the alleged deficit or surplus accruing under the prescribed divisions (R. 1252).

**The "Typical Hauls" Selected and Used by Appellants.**

The appellants concede, as we understand their position, that "ordinarily it would be unsound to use a system unit cost to determine cost *over a particular portion of a system line.*" They say further on brief that "ordinarily it would be unsound to use a system unit cost to approximate the cost of handling *a particular commodity*" (Appellants' original brief, pp. 22, 36).

The northern lines assert, however, that their use of system average unit costs in the instant case is justified upon the theory that such system average costs have been shown by them to be *less* than the cost to the respective appellants of the citrus fruit transportation. As supporting that contention they further assert that they have shown, with respect to "*the principal portions of their respective system lines necessarily used*" in this citrus fruit transportation (Brief, p. 39):

> (a) By testimony of operating officers descriptive of special line-haul and terminal services incident to the citrus fruit transportation, together with expressions of opinion by such expert witnesses, that the citrus fruit cost per unit of *that* traffic exceeds the average unit cost of *all* traffic on the respective systems;
>
> (b) By certain statistical computations, that the unit cost of *all* traffic on the lines principally utilized by the citrus fruit movement exceeds the respective system average unit costs on all traffic.

Attention is particularly directed to the words "principal portions of their respective system lines." Appellants have themselves on brief described such principal portions as follows:

> "The record establishes (R. 255-56) that, during the 1928-29 test period, the bulk of the citrus fruit ship-

ments transported by the Baltimore & Ohio and the Pennsylvania utilized *those portions of the lines of these carriers extending from Potomac Yard, Va., to Baltimore, Philadelphia and New York''* (Appellants' original brief, p. 54).*

Furthermore, appellants have themselves selected and used in their cost calculations certain chosen and designated movements of citrus fruit. They allege in the bill of complaint that these selected cars represent ''particular and *typical* hauls'' (R. 15). It is with respect to these selected and ''typical'' hauls that appellants have computed the alleged costs, as contrasted with revenues under the prescribed divisions, to the Pennsylvania, the B. & O. and the R. F. & P., respectively, as set forth in the amended bill (R. 146, 147) and as offered before the District Court as proof of the alleged confiscation.

The typical hauls thus selected and used in appellants' cost calculations are 17,324 cars of citrus fruit which moved, during the 1928-29 test period, via Richmond and Potomac Yard to New York and other eastern markets that are reached directly by the lines of the Pennsylvania or the B. & O. extending from Potomac Yard. No cars which moved beyond the lines of the Pennsylvania or the B. & O.—for example, to Boston, Mass., or Portland, Me.—are included in these calculations at all (R. 1294, 1330).

Analysis of appellants' exhibits (Hodkinson's Exhibit No. 10) will show that out of the 17,324 cars thus selected 8,854 cars were delivered at New York and Jersey City; 4,146 cars at Philadelphia; and 1,461 cars at Baltimore; or a total of 14,461 cars to these four cities alone. The remaining cars went in smaller lots to other important points, such as Newark, N. J., Wilmington, Del., Pittsburgh and Harrisburg, Pa., and others, which are reached directly by

*Where quotations are italicized herein the italics have been supplied unless otherwise indicated.

main lines extending from Potomac Yard; or in scattered lots of a few cars to a number of other points all of which are reached by what may fairly be termed main lines. The figures, in other words, confirm appellants' above-quoted statement on brief that "the bulk" of the citrus fruit shipments utilized the lines of the Pennsylvania or the B. & O. "*extending from Potomac Yard, Va., to Baltimore, Philadelphia and New York.*" Appellants have themselves selected and used those particular lines in their descriptive testimony and statistical data abovementioned.

The selected 17,324 cars, moreover, do not include all of the cars which the Pennsylvania and the B. & O. actually delivered. They include no cars which originated in Florida on the Florida East Coast Railway, nor any cars which the Southern Railway brought into Potomac Yard (R. 1330). The Commission found that in the 1928-29 season the Pennsylvania actually delivered at New York City alone a total of *11,358 cars* of citrus fruit (R. 54). The Commission further found and stated in its report that to a great extent the citrus fruit is what may be termed "concentrated traffic", in that it moves "mainly to the most populous cities in the North" (R. 54).

With respect to the comparatively small number of shipments to central territory (8,773 cars in 1928-29), which shipments do not pass through Potomac Yard but move from Florida via the Ohio River gateways, such as Cincinnati, similar cost calculations were separately made by the central territory lines, interveners in the court below.

Plainly, therefore, the Court is not here being called upon to deal with individual and sporadic cars of citrus fruit moving here and there at random over the entire systems of the Pennsylvania or the B. & O. On the contrary, this case relates particularly to a definite and designated movement of citrus fruit which passes from the south through the Potomac Yard gateway to the important mar-

kets in the east. All of it is moved out of Potomac Yard by either the Pennsylvania or the B. & O., principally by the first-named road. It is upon such traffic—destined principally to a relatively small number of large eastern cities, such as New York, Philadelphia, etc., and moving over the main lines of the Pennsylvania or the B. & O., from Potomac Yard directly to those points—that the Commission's prescribed divisions are attacked in the original bill filed by the three northern roads, to-wit, the Pennsylvania, the B. & O., and the R. F. & P.

1.

**Appellants Have Not Proved That the Unit Cost of the Particular Citrus Fruit Transportation Here in Question is Either Equal to or Greater Than Their Respective System Average Unit Costs on All Traffic. On the Contrary, the Citrus Fruit Cost is Shown by the Facts of Record, Together With the Findings of Both the Commission and the District Court, to be Far Below Such System Average Unit Costs.**

In stating the conclusions of the District Court upon the issue of confiscation, Judge Soper uses the following language in the opinion (R. 258, 259):

> "Whether tests designed to show precise costs could have been made, at least in some particulars, it is useless to speculate. We must take the case as we find it, and we can only say that the evidence does not convince us that system average freight car mile cost may be safely used to ascertain the cost of carrying citrus fruit."

And further:

> "The special conditions surrounding the movement of citrus fruit, and especially the transportation by the northern lines of trains made up wholly or in large

part of citrus and other perishable foods delivered to them in large quantities at a particular gateway, suggest that in a sense the commodity *is dealt with by them in wholesale rather than in retail quantities.* Again, *the peculiar conditions general (ly) applicable* to the movement of freight on the Pennsylvania Railroad between Richmond and New York make it extremely hazardous to apply to that large portion of the whole movement of citrus fruit which is transported between these points, average figures obtained by a statistical generalization of uncertain meaning."*

It plainly appears, therefore, that in reaching its conclusion the District Court was influenced especially by two considerations, namely:

(a) The fact that the citrus fruit is delivered to the northern roads at particular gateways "in wholesale rather than retail quantities";

(b) The "peculiar conditions" generally applicable to the movement of all freight over the particular lines over which the citrus fruit *actually moves.*

The "peculiar conditions" thus referred to undoubtedly embrace the conditions which are conducive of low operating costs of *all* traffic on such lines, for example, as the Pennsylvania's line from Potomac Yard to New York City, and the B. & O.'s line from Potomac Yard to Baltimore and Philadelphia. They include, among other things, the fact that these are main lines of railroad and lines of exceptionally heavy density, or volume, of traffic, as previously mentioned in the court's opinion. The court said:

"Comparing the lines over which citrus fruit moves on the Pennsylvania and the Baltimore & Ohio with

*Apparently through inadvertence, the court fails to mention at this point that the line from Richmond to New York consists in part of the line of the R. F. & P. from Richmond to Potomac Yard.

the remainder of these systems, it appears that the former, being less than 15 per cent of each system, are lines of particularly heavy freight traffic density, bearing a ratio of 365 per cent in the case of the Pennsylvania, and 352 per cent in the case of the Baltimore & Ohio, to the traffic density of the balance of the system. Similar ratios of passenger traffic density are 558 per cent for the Pennsylvania, and 550 per cent for the Baltimore & Ohio. Between Potomac Yard and Jersey City on the Pennsylvania, the freight traffic density is four times as much, and the passenger density eight times as much as on the balance of the system. The effect of heavy freight traffic density is a reduction in the operating expense per unit of traffic for the reason that a large part of the operating expenses remain constant and unaffected by the volume of traffic, and hence as traffic increases, the cost per unit decreases. About two-thirds of maintenance of way and structure expense, 43 per cent of maintenance of equipment expenses, and a substantial proportion of transportation expenses are constant. Heavy passenger traffic density produces a larger spread of expenses common to passenger and freight service, and thereby further decreases freight unit costs'' (R. 256).

It will thus be seen that there are two outstanding circumstances which are conducive of *exceptionally low* cost to the appellants of this citrus fruit transportation. They negative any suggestion that this citrus fruit unit cost exceeds appellants' respective system average costs on all traffic, or that such system average costs afford any measure whatever of the actual citrus fruit cost. One pertains directly to *train operations,* including the physical handling of the citrus fruit over the line and in terminals. It arises out of the enormous volume of this citrus fruit, together with similar perishable commodities, which the northern roads receive at Potomac Yard, as well as at Richmond, thus affording the greatest possible opportunity for economical train operations north of those dividing gate-

ways. The other pertains to citrus fruit and all other traffic on the particular portions of the Pennsylvania or B. & O. systems over which this citrus fruit *actually moves.*

We will next show that both of these reasons for relatively low cost of this citrus fruit transportation by the appellants are overwhelmingly substantiated by the evidence of record in this case, including the facts found and stated by both the Commission and the District Court.

## A.

### The Receipt by Appellants at Potomac Yard, as Well as Richmond, of Citrus Fruit and Similar Perishables in Large Volume, and in "Wholesale" Quantities, Sufficient to Permit the Operation of Solid, or Practically Solid, Trains Composed of Such Perishable Traffic, Contributes Inevitably to Economical Train Operations North of Those Gateways.

Testifying before the Commission, and again before the District Court, Mr. N. S. Menaugh, a witness for the Pennsylvania, stated that during the period which appellants have used as representative, to-wit, the 1928-29 shipping season, there moved through the Potomac Yard from the south to northern markets carloads of citrus fruit, together with other perishable fruits, vegetables, melons and berries, which in the aggregate totaled *102,034 cars in 1928; 107,496 cars in 1929;* and *101,245 cars in 1930* (R. 654, 1361).

These figures represent the combined volume of such perishable food products which originate in the various producing areas throughout the entire south, as well as in Florida. They are brought into Potomac Yard either directly by the Southern Railway Company, a carrier whose lines penetrate practically all portions of the south; or they are brought up to Richmond by the lines of both the Atlantic

Coast Line and the Seaboard Air Line systems, and are there delivered to the R. F. & P. and transported by the last-named road to Potomac Yard. In the 1928-29 season the movement of citrus fruit alone through Potomac Yard totaled more than 29,000 cars (R. 362).

**The Potomac Yard Operation.**

Potomac Yard is the large freight yard which is located between Washington and Alexandria just south of the Long Bridge. It is maintained for the particular purpose, among other things, of handling the enormous volume of perishable freight which annually passes through this important gateway between the south and the north. It is a *jointly operated* terminal, the expense of which is defrayed by the roads whose trains enter the yard, namely, the Pennsylvania, the B. & O., the R. F. & P., the Chesapeake & Ohio Railway, and including also the *Southern Railway Company,* one of the appellees here (Menaugh, R. 654-5, 1363).

On arrival at Potomac Yard from the south the refrigerator cars in which this perishable freight is almost invariably loaded are reiced in the yard, when necessary; inspected; classified; and assembled into trains for movement north by the Pennsylvania or the B. & O.—*all of these preliminary services being performed by the joint agency.* The witness Menaugh testified:

> "The entire service of classification, making up and breaking up of trains, and deliveries to the Pennsylvania Railroad for movement beyond Potomac Yard is performed by the joint operation at Potomac Yards, the joint agency. When the trains have been classified and are ready for movement beyond Potomac Yard the Pennsylvania Railroad individually *does not have anything more to do than to attach its engine to the train and start it forward*" (R. 714).

The same witness stated that in the classification of cars and make-up of trains at Potomac Yard the cars destined to New York City (which is by far the largest single market in the country for these southern fruits, vegetables and other perishables) are thrown together and consolidated into one train; that this is the usual practice; and that it can be and is done without difficulty. (R. 716).

**Volume and Regularity of Movement Through Potomac Yard.**

Of this large volume of perishables passing through Potomac Yard by far the greatest portion is delivered to the Pennsylvania Railroad, and is moved to the north by that carrier. With respect to the citrus fruit, the Commission states in its report (R. 55):

> "In 1928-29 the Pennsylvania received 24,123 carloads of citrus fruit at Potomac Yard and delivered 18,430 of these to final destinations on its own rails. In the same period the Baltimore & Ohio received 4,502 cars and made final delivery of 3,128 of these."

In other words, out of approximately 29,000 cars of citrus fruit which passed through Potomac Yard in 1928-29 every bit of this traffic was moved out by the Pennsylvania, except 4,502 cars which were handled by the B. & O. Of the combined tonnage of citrus fruit and other perishables, it was stated that during the period September 1, 1928 to June 30, 1929, the B. & O.'s entire movement totaled only 12,366 cars (Ward, R. 780).

So far as New York City is concerned, it conclusively appears that the Pennsylvania enjoys an absolute monopoly upon the movement of this perishable traffic from Potomac Yard. *The record discloses not a single car of citrus fruit which the B. & O. handled to New York during the test period.* The Commission describes in its report the exten-

sive "produce terminals" which the Pennsylvania maintains at New York for the handling of its perishable traffic as a whole at that point. The Commission said:

> "In 1927 the Pennsylvania converted three of its North River piers at New York into a produce terminal, having capacity for unloading and displaying 700 cars of perishable freight with eight auction rooms for the use of consignees and buyers and other facilities for their convenience. At this terminal, and also apparently at Philadelphia, carload perishable freight is unloaded by the carrier. Other unusual services in connection with this traffic are also performed by the carriers, such as furnishing passing reports, advance notice of arrival, and special reports showing the location of the freight in the terminal" (R. 59).

The Commission adds (R. 73):

> "The expensive terminals in the eastern cities appear to be *an outgrowth of the strong competition for perishable traffic.*"

The Commission further found and stated in its report (R. 57, 58):

> "During the height of the shipping season from November to May, it appears from a chart based on the 1928-29 season that the Pennsylvania seldom received less than 50 cars of citrus fruit per day at Potomac Yard and frequently as many as 200 cars. *During the height of the citrus season the Pennsylvania operates solid trains of perishables from Potomac Yard to New York.*"

The chart here referred to (Reproduced in the Appendix, *infra*) was prepared and offered in evidence by the Pennsylvania's witness, Mr. Menaugh. It appears in this record as Menaugh's Exhibit No. "B". It graphically displays the actual daily movement by the Pennsylvania from

Potomac Yard of both citrus fruit and other perishables during the period September 1, 1928 to August 31, 1929.

From this chart it may be seen that the citrus fruit from Florida moves during the months of September to July, inclusive. During this entire period the citrus fruit movement is completely overlapped in point of time by a similar movement of other perishable fruits, vegetables, melons and berries from the south. All of these commodities are handled alike from Potomac Yard in the same trains, on the same schedules, and ordinarily in the same class of equipment, namely, refrigerator cars (R. 1349).

It may be seen also that although there are considerable fluctuations in the daily volume of the movement, there was nevertheless hardly a single day during the entire period October 1 to July 31 in which the Pennsylvania failed to receive from the joint yard agency at least as many as *100 cars* of citrus fruit and other perishables combined; that during a very large portion of the citrus shipping season it received *regularly and day by day* at Potomac Yard at least as many as *from 200 to 400 cars;* and that during the peak of the movement it received on numerous consecutive days as many as *from 400 to as high as 800 cars* of this perishable traffic.

It is to a movement of such character that the District Court was referring when the court observed that the citrus fruit together with other perishable products is dealt with by the appellants in "wholesale" quantities (R. 259). It requires no argument to show that the receipt by any railroad at a single point of such large volumes of a particular type of traffic contributes to the lowest possible cost of train operations in the transportation of such traffic. Especially is this true when it is traffic which requires a special and unusual type of transporfation service, such as perishables.

We will next show the extent to which these advantageous circumstances are in fact reflected in appellants' actual train operations north of Potomac Yard.

**Train Operations North of Potomac Yard.**

The witness Menaugh explained that the citrus fruit and other perishables are transported from Potomac Yard in "arranged freight train service"; that the so-called "perishable" trains are operated on no fixed schedules, but are run as "extras"; that these trains are timed to meet the requirements of the marketing hours for this produce at the "produce terminals" in such cities as New York and Philadelphia; and that the only time limitation on these trains is that a "zero hour", or fixed time, is set at Potomac Yard at which a train must be ready to leave the yard in order to make a scheduled market delivery at destination. He further testified that the Pennsylvania regularly operates a particular train, designated as "M. D. 12", which runs *directly* from Potomac Yard to Harsimus Cove (Jersey City) especially for the movement of the New York business, while there are other and additional trains which also make deliveries at that point (R. 715, 1351, 1353).

The Pennsylvania normally operates daily "an average of about fourteen or fifteen" of these arranged freight service trains out of Potomac Yard for certain designated terminals, including "Harsimus Cove, Greenville, Philadelphia, Edgemoor, the terminal at Wilmington, Baltimore and Enola for Harrisburg" (Menaugh, R. 1350).

**Solid Trainload Movements From Potomac Yard**

In their original brief appellants take issue with the District Court's conclusion that such "wholesale" handling of citrus fruit and other perishables from Potomac Yard

tends to diminish the actual transportation cost on this traffic. They particularly attack the reference which was made by both the Commission (R. 58) and the court below (R. 255) to the movement of "solid trains" of these perishables from Potomac Yard. Appellants say, for example, on brief:

> "Taking the arranged freight service trains out of Potomac Yard destined to Baltimore, Enola, Edgemoor, Philadelphia, Greenville, and Harsimus Cove, a check of the movement during the season of 1928-29, when the perishable movement was at its height, developed that only 13 per cent of such trains were solid perishable trains, and a similar check of 1933 operations showed that only 5 per cent of such trains operated out of Potomac Yard were loaded solid with perishables" (Appellants' original brief, p. 102).

Appellants refer also to "grade conditions" on certain portions of the lines north of Potomac Yard; "tonnage reductions" below full engine rating capacity; and the "double heading", *i. e.*, use of two engines, between Potomac Yard and Baltimore when the trains *carry as many as 100 cars* (Brief, pp. 102-104).

It can readily be perceived that the term "solid train" is susceptible of two meanings. In one sense it may be used to mean a train which is composed entirely of carloads of a particular commodity, such for example as citrus fruit. In the other sense it may mean a train which is made up at a given point and is then run through directly to a given final destination, without any break-up at intermediate points for the purpose of taking on or setting off cars at such points.

The weight of both the Commission's and the lower court's findings upon this subject can not now be impaired by the appellants by any mere play upon words. What both the Commission and the court stated—which was also

the statement of the Pennsylvania's witness, Mr. Menaugh —was that during the height of the shipping season the Pennsylvania moves from Potomac Yard trains composed *exclusively* of perishables, and operates those trains directly to New York without any intermediate break-up, *at the rate of at least one, and very frequently two, such trains per day* (R. 716, 1361).

Mr. Menaugh said that "we *ordinarily* operate those trains as through solid trains from Potomac Yard to Harsimus Cove if we have the volume" (R. 716). He further stated:

> "If we have the volume we run exclusively perishable trains out of Potomac Yard. If not, we fill out with other commodities ready to go at that time. With the exception of the New York trains I would say that our trains are not exclusively perishable" (R. 715).

This, of course, merely means that when one of the Pennsylvania's "arranged service trains" carrying perishables leaves Potomac Yard, either for New York City or for other destinations, it is made up exclusively of perishables whenever the volume of that traffic justifies. Otherwise, there are added such cars of ordinary freight as may happen to be available when the train is ready to start. In other words, one of these trains may leave Potomac Yard for New York carrying 100 cars of which 95 cars are loaded with perishables. But because 5 box cars of merchandise may happen to be available when the train is ready to start those cars are handled also. Yet the appellants, it may be presumed, would not count that train as a "solid perishable train" or include it in their abovementioned estimate of "13 per cent" of the total number of trains.

**Record of Actual Train Movements From Potomac Yard and Richmond.**

The District Court's observations respecting the "wholesale" handling and "solid train" movement of these perishables are supported by the *actual record* of train movements from Potomac Yard during the test period used in this case, including the trains over the R. F. & P. from Richmond to Potomac Yard. Because of appellants' persistent effort to belittle the facts in this connection and their repeated references to only "occasional" solid trains of these perishables, this record and analysis of train movements was compiled from the train records kept at Potomac Yard. It includes the trains actually operated, by weeks, during the entire period November 9, 1928 to June 30, 1929. It was intentionally limited to the Pennsylvania and B. & O. trains moving to the east and not to the west, because it is these particular movements to the east that are here in question. The results of this check appear in the record here as Tassin's Exhibit No. "A" (R. 1477-8).

In this exhibit a separation is made between (1) trains consisting 50 per cent or more of cars loaded with perishables; and (2) all other trains.

This exhibit shows, among other things, the following:

During this period of about seven months, the Pennsylvania operated out of Potomac Yard a total of 1,123 trains consisting 50 per cent or more of cars of perishable freight.

The cars handled in these 1,123 trains totaled 68,142 cars. Out of this total *58,256 cars consisted of perishables*—apportioned as follows: citrus fruit, 19,872 cars; other perishables, 38,384 cars.

The combined total of *all other* cars, *i. e.*, cars of other freight, in these 1,123 trains out of Potomac Yard was *only 9,240 loaded cars and 646 empties.*

During the same period there were handled *in other trains* (consisting less than 50 per cent of perishables) only 6,120 cars of citrus fruit and 9,212 cars of other perishables.

Of the trains consisting 50 per cent or more of perishables *more than 400 trains* left Potomac Yard during this period carrying *from 70 to 100 or more cars.*

The R. F. & P. receives at Richmond the combined cars of perishables which are there delivered to it by both the Atlantic Coast Line and the Seaboard Air Line, whose lines converge at that point. During the period in question the R. F. & P. operated from Richmond to Potomac Yard 1,130 trains consisting 50 per cent or more of cars of perishables. In these 1,130 trains there were moved a total *of 36,335 cars* of citrus fruit and other perishables. The entire movement in these trains of cars loaded with other freight totaled only 6,628 loaded cars and 2,359 empties.

Based upon this check and analysis of the trains, Mr. Tassin, General Statistician of the Southern Railway System, stated:

> "As Mr. Menaugh testified, there are *from one to two trains per day of solid perishables from Potomac Yard to New York"* (R. 1478).

The foregoing record of actual train movements incontrovertibly sustains the findings of the court below. When any railroad receives traffic at a single point in such large volume, and when this traffic is transported in train movements of such character, the transportation cost per unit of such traffic is necessarily reduced to an absolute minimum.

**A—EFFECT OF SUCH "WHOLESALE" OPERATIONS UPON ACTUAL OPERATING COST AS CONTRASTED WITH REVENUES UNDER THE PRESCRIBED DIVISIONS.**

The effect of such "wholesale" handling upon operating costs is well illustrated by the Potomac Yard operation. Appellants have greatly stressed and relied upon the testimony of operating witnesses descriptive of alleged special services and expense incident to the citrus fruit transportation, in connection with both terminal and line-haul operations. They refer on brief to "fluctuations" in the daily movement; "holding" of cars for diversion; necessity for quick handling; increased clerical and other yard forces; and other matters of that sort (Appellants' original brief, pp. 42-45). But, attributable directly to the enormous number of cars which regularly pass through that terminal, a computation of the operating expense *on a per car basis* showed that the actual expense *per car* of the Potomac Yard operation in the year 1929 amounted to *exactly 97.34 cents* (R. 1475).

Appellants also emphasize greatly the alleged unreasonably low character of the divisions which the northern roads are allowed under the Commission's order in this proceeding. They are asserting before this Court that these divisions are so low as to be confiscatory. Their divisions may at first blush appear to be small in amount but they are by no means either unreasonable or confiscatory when all of the surrounding facts and circumstances are considered.

*Illustrative Earnings from Train Operations.*

As illustrative, let us take a car of citrus fruit which originates in Florida on the Atlantic Coast Line and is moved by the Pennsylvania from Potomac Yard to New York City. The Commission in its order fixed the divisions to accrue north of *Richmond*. The Pennsylvania and the R. F. & P. divide the amounts so allowed north of Richmond upon a

basis voluntarily agreed upon between themselves (R. 1331). According to appellants' exhibits (Hodkinson's Exhibit No. 10), the Pennsylvania individually receives under this agreed basis, for its haul from Potomac Yard to to New York, revenue of about $54.60 per car. Let us assume further—as might very well be the case—that the Pennsylvania moves this car of citrus fruit from Potomac Yard in one of its "M. D. 12" trains, carrying 100 cars of perishables exclusively, and running directly from Potomac Yard to the Pennsylvania's terminals at Harsimus Cove (Jersey City). The cars in that train would all be reiced and classified at Potomac Yard and the train would be completely made ready for movement from the yard by the joint agency. The Pennsylvania would merely attach its engine to the train at the north end of the yard and "highball" it (as the railroad men say) straight away for New York as fast as possible, and over its double—and in many places quadruple (R. 681)—track line of railroad. If it so happened that all of the cars in that train were loaded with citrus fruit the Pennsylvania, from the operation of that one train alone, *would receive revenue of more than $5,400.* Yet the Pennsylvania is here alleging that its earnings from such operations are so low as to be insufficient to defray even its actual operating expenses and taxes.

There can be no room for any assertion that the foregoing is merely an extreme case. We have shown that during the period November to June the Pennsylvania actually operated from Potomac Yard *over 400* of these "arranged freight service trains" which carried from *70 to more than 100 cars* per train; that it operated daily at least one, and frequently two, *exclusively* perishable trains directly from Potomac Yard to New York; and that in 1,123 trains operated during this period there were handled *36,335 cars of perishables,* as against only 6,628 cars of other freight and 2,359 empty cars.

By way of contrast, let us take one of the Pennsylvania's passenger trains running from Washington to New York and carrying 10 Pullman cars. If that train obtains a load of as many as 150 passengers, the figure probably exceeds greatly the average actual load. The price of a one-way ticket to New York is $8.14 (3.6 cents per mile for approximately 225 miles). On this basis the Pennsylvania's revenue from this passenger train between Washington and New York would amount to exactly $1,221. But the Pennsylvania regularly operates dozens of such passenger trains and it vigorously solicits the business through extensive advertising and otherwise.

When earnings of such character are in sight on this perishable freight it is not surprising that the Pennsylvania is willing to and does perform—voluntarily and at its own expense, and solely for the benefit of the receivers of these perishable products at destination—the many extra and unusual services which the Commission describes in its report (p. 13, *ante*) and which are likewise enumerated in appellants' brief on this appeal (at pp. 47, 48). The Pennsylvania obviously performs these exceptional services for the shippers and receivers for the immediate purpose *of attracting to its own line every possible carload of this large volume of citrus fruit and other perishables which annually passes from the south through Potomac Yard.*

**B—REVENUE UNDER THE PRESCRIBED DIVISIONS CONTRASTED WITH OPERATING COST AS COMPUTED BY APPELLANTS ON A "SYSTEM AVERAGE CAR MILE" BASIS.**

The Pennsylvania has compiled and offered in this case an alleged cost of $59.88 as being even less than its cost of transporting a car of citrus fruit between Potomac Yard and New York (Hodkinson's Exhibit No. 10, p. 2). The Pennsylvania, in other words, is in effect asking the Court to believe *that it would cost that railroad over $5,900* to operate the abovementioned 100-car train from Potomac

Yard to New York, a distance of about 227 miles. The figures are themselves sufficiently illustrative of the positive absurdity of computing an *average* car mile cost of all freight of every description on the Pennsylvania's entire system of over 10,000 miles of railroad, and then using that figure as purporting to represent *even less* than the Pennsylvania's actual cost of transporting this citrus fruit from Potomac Yard to New York City.

When the Pennsylvania computes a system *average* car mile cost of this sort and uses the resulting figure to represent its citrus fruit cost—in its "arranged freight service trains" from Potomac Yard to New York, Philadelphia, or elsewhere—that carrier is knowingly and deliberately inflating this alleged citrus fruit cost with all of its heavy expense of assembling cars of coal at the mines in the mountains of Pennsylvania and West Virginia; with all of its expensive operations in gathering and assembling cars of fruits and vegetables on its numerous small branch lines and stub lines which penetrate the producing areas in New Jersey and the Maryland and Delaware peninsula; with the expense of every local freight train on its entire 10,000 mile system, which stops at every way station to perform switching and set off or take on cars; with all of the enormous expense of switching cars of every description in terminals at every large city on its entire system, such as Chicago, St. Louis, Pittsburgh and many others, because such intraterminal switching is not counted when computing total freight *car miles* covering line-haul movements (R. 1414, 1466).

It is inflating this alleged citrus fruit cost with the costs of all of its most expensive kinds of freight, such as merchandise freight, less-carload freight, fresh meats, and many similar commodities, when moving anywhere on its entire system. It is saddling upon the citrus fruit cost its expense of switching all connecting line traffic on its system, as well as the expense of the *two* terminal operations,

including switching incident to placing empty and assembling loaded cars, and all other intraterminal switching, on the enormous volume of freight which both originates and terminates on its own lines; whereas this case relates to the *divisions* of rates on citrus fruit moving interterritorially from the south to the north, on all of which the terminal expense at point of origin is borne by the southern roads (R. 1415).

All of the above results necessarily flow from appellants' use of a computed "system *average* freight car mile cost", because as stated by appellants' witness, Mr. Hodkinson, referring at the moment to the B. & O.:

> "The total freight car miles include all of the car mileage, both loaded and empty, heavy cars, light cars, local shipments, shipments originating on the line for delivery to connecting lines, shipments originating on connecting lines and delivered on the line of the B. & O., and shipments handled overhead, that is, shipments originating beyond the line of the B. & O. and being transported by the B. & O. as an intermediate carrier, and delivered to some other carrier for final delivery" (R. 1237).

In comparing such system average costs with the actual citrus fruit cost appellants are not comparing like with like. There is in fact no relationship whatever between the two.

When its alleged citrus fruit costs are computed in such manner it is not surprising that the Pennsylvania succeeds in producing the distorted cost figures abovementioned, which it is here asserting to be *even less* than its actual cost of the citrus fruit transportation. The fact is that such figures mean simply nothing at all when used to measure the actual cost of transporting this citrus fruit.

Even Mr. Hodkinson, the statistician who offered appellants' exhibits, took pains to disclaim individual responsibility for the adopted method of cost calculation. He stated

that the determination to use this procedure was reached "at a meeting of a committee of the accounting officers and operating officers representing the northern lines, at which I was present and a member" (R. 1225).

Appellants say on brief that southern lines have "admitted" that such system average cost, if computed on a "gross ton mile" basis, would "*understate* the cost of handling citrus fruit" (Appellants' original brief, p. 90). There is then quoted the statement of a southern witness that

> "* * *the gross ton mile basis does not truly reflect either for the southern lines or for the eastern lines, on the system average, the cost of handling the traffic."

It requires a strange distortion of language to find any such alleged admission in this statement. No such admission was made by any witness for the southern roads. On the contrary, the southern roads have insisted throughout the case, and are likewise contending here, that no computed *average* system cost, whether upon a "car mile" or a "gross ton mile" basis, is representative of the actual cost of this citrus fruit transportation by either northern or southern roads. What the southern witnesses did assert is that by using such computed system average unit costs appellants have succeeded in deflating in that manner their alleged citrus fruit cost *for the southern roads*, for the reasons which will hereinafter be shown (R. 1416-18).

## B.

### The Unit Costs of All Freight on the Pennsylvania's and B. & O.'s Lines Over Which the Citrus Fruit Moves From Potomac Yard Are Neither Equal to Nor Greater Than the Average Unit Costs on the Respective Systems as a Whole. On the Contrary, Such Costs Are Shown on This Record to be Far Below Such System Averages.

In further attack upon the conclusions of both the Commission and the court below, appellants contend that the unit cost of all freight on their lines *over which the citrus fruit actually moves* is in excess of the respective system average unit costs, which latter include all traffic of every description on the respective systems as a whole. Appellants first correctly state that the bulk of the citrus fruit transported by the Pennsylvania and the B. & O. "utilized those portions of the lines of these carriers extending from Potomac Yard, Va., to Baltimore, Philadelphia and New York" (Appellants' original brief, p. 54). But they then claim to have proved the relatively high operating costs *on these particular lines* (a) by descriptive testimony of operating witnesses; and (b) statistical computations comparing computed unit costs on these lines with corresponding costs on the respective systems. They even go so far as to assert on brief that:

> "Finally we have the *uncontradicted* testimony of Messrs. Clark and Bonn as to the much higher unit costs on those portions of the lines of the Pennsylvania and Baltimore & Ohio between Potomac Yard and New York" (Appellants' brief, p. 105).

What the District Court actually said in its opinion (quoted at p. 8, *ante*) was that "comparing the lines *over which citrus fruit moves* on the Pennsylvania and the Balti-

more & Ohio with the remainder of these systems" it appeared that the former, even including *all* destinations embraced in appellants' cost calculations, are lines on which the density of both freight and passenger traffic is far in excess of that of the balance of the systems; and further, that "between Potomac Yard and Jersey City on the Pennsylvania" the freight traffic density is more than four times, and the passenger traffic density more than eight times, that of the balance of the Pennsylvania system as a whole. The court further stated that the effect of such heavy density of both freight and passenger traffic is to bring about a lowering of the operating expense per unit of freight.

### A—APPELLANTS' SO-CALLED "UNCONTRADICTED" TESTIMONY RESPECTING UNIT COSTS.

The "uncontradicted testimony of Messrs. Clark and Bonn" to which appellants refer on brief is in the form of statistical exhibits compiled by those witnesses—the one relating to the Pennsylvania (Clark's Exhibit No. C-1), and the other relating to the B. & O. (Bonn's Exhibit No. B-1).

These exhibits purport to show, with respect to "The Eastern Region and the New York Zone (P. R. R. portion)" of the Pennsylvania System, and the "Baltimore Division" of the B. & O., that the respective system average unit costs of all traffic, as expressed in operating expense per freight car mile, is *less* in each case than the corresponding cost similarly computed for these designated portions of the systems (Appellants' original brief, pp. 54, 55).

The witness Clark explained that the "Eastern Region and New York Zone (P. R. R. portion)" of the Pennsylvania System embraces those lines which lie east of Altoona and Renovo, Pa., except the Long Island Railroad (Exhibit No. C-1, *supra*). Altoona is about midway be-

tween Harrisburg and Pittsburgh on the line extending westward from Philadelphia. Renovo is almost directly north of Altoona on the line from Harrisburg in the direction of Erie and Buffalo.

A glance at any map of the Pennsylvania System will show that the portion lying east of Altoona and Renovo, (even excluding the Long Island R. R.) represents in point of mileage *a very substantial portion of the entire system.* It includes a perfect network of lines *over many of which not a car of Florida citrus fruit has ever moved or is ever likely to move.* It includes, among others, numerous main and branch lines which lie in practically all portions of the eastern half of Pennsylvania, together with the states of New Jersey, Delaware and Maryland, as well as the lines in New York and the "Eastern Shore" section of Virginia. It includes, for example, the numerous stub lines, and short branches, of the Pennsylvania which penetrate the important vegetable producing areas in New Jersey and the Maryland and Delaware peninsula. They are in some respects similar to the lines which the Atlantic Coast Line and Seaboard Air Line have built out into the citrus fruit and vegetable producing areas in Florida, primarily if not solely for the purpose of assembling and transporting the citrus fruit and other perishables. The exceptional expense of operations of this sort in the Florida peninsula was emphasized by the Commission in its report in the instant case (R. 55). Yet the Pennsylvania would now have it appear that a computed average cost which reflects all of its own expensive branch line operations of similar character, as well as numerous other branch line operations, is representative of the unit cost *on its line extending from Potomac Yard to New York City, and its 100 car trains of citrus fruit and other perishables passing over that line.*

According to Mr. Bonn's testimony, the "Baltimore Division" of the B. & O. embraces "approximately 10 per cent

of our mileage." It includes all lines east of Brunswick, Md. (near Harper's Ferry) and south of Philadelphia. It includes also the B. & O.'s line running down into the Shenandoah Valley of Virginia to Strasburg Junction and the line between Harrisonburg and Lexington, Va. (R. 1394). In the case of the B. & O., every car of citrus fruit from Potomac Yard to the east must necessarily pass over the line between Washington and Baltimore. But the B. & O. would now have it appear that the transportation cost per car of citrus fruit or other freight on that line between Washington and Baltimore *exceeds the average cost per unit of freight on all lines included in the so-called "Baltimore Division."*

The District Court's findings respecting the heavy volume of freight on the Pennsylvania's and B. & O.'s lines over which the citrus fruit moves from Potomac Yard are supported by an analysis of the movement of every car which was included in appellants' cost calculations. The relative density of traffic on those lines, as contrasted with other portions of the systems, was obtained from studies of recognized and admitted reliability (R. 1273). The exhibits upon this subject appear in the record as Knight's Exhibits Nos. K-5, K-6 and K-7 and K-5-A, K-6-A and K-7-A (R. 1516-21). The exhibits show what is indeed a matter of common knowledge, namely, that the Pennsylvania's line between Washington and New York, and the B. & O.'s line between Washington and Philadelphia, are lines over which an enormous movement of both freight and passenger traffic is regularly handled. They show further that even including all points which received as many as ten cars of citrus fruit, and all lines from Potomac Yard to such destinations, the traffic density on all such lines combined was more than three times that of the balance of the systems.

Referring to the Pennsylvania's line between Philadelphia and New York, the witness Menaugh said:

> "On this division the P. R. R. has a traffic movement without equal on any other part of the System, *if indeed it is equaled anywhere in the world*" (R. 680).

The transportation of such large volumes of freight on any given line of railroad results of necessity in a lowering of the cost per unit of traffic, as expressed in either cars or in tons of freight. As the District Court stated:

> "About two-thirds of maintenance of way and structure expense, 43 per cent of maintenance of equipment expenses, and a substantial proportion of transportation expenses are constant" (R. 256.)

Where so large a proportion of the total operating expense remains constant, and unaffected by the number of cars or tons of freight actually handled, it must follow inevitably that the greater the number of such units of freight over which these fixed expenses may be spread the smaller is the operating expense per unit (R. 1522-3).

Upon this subject we have the testimony, among others, of Mr. J. E. Teal, Transportation Engineer of the Chesapeake & Ohio Railway, an appellant here. This witness said:

> "The operation or handling of one car over one mile of branch line is conceded to be more expensive than the same car over one mile of main line operation. When we get to the main line we have lots of cars and lots of tons. Traffic density is generally considered as a measure of the number of units that may be handled on a mile of railroad. You might call it train miles or gross ton miles or net ton miles. That is traffic density. It is the volume of business measured in different units. *As we increase our volume of business and get long trains, that is where we get our low operating costs on the C. & O. Railroad*" (R. 1391).

Another of appellants' witnesses, Mr. Coverston, offered certain estimates of alleged terminal costs which varied from $13.93 per car in some months to $27.43 per car in other months. When asked to explain the reason for this variation the witness' reply was that in the month of lowest per car cost *the greatest number of cars were handled at these terminals* (R. 1292).

The northern lines have themselves conceded, as we have shown (p. 4, *ante*), that "ordinarily it would be unsound" to use a system average unit cost as a measure of either the cost of an individual commodity or the cost of all freight on particular lines which are but a part of large railroad systems. But they then proceed notwithstanding to compile and rely upon the same sort of computations of average costs *for large portions* of such systems, including main lines and branch lines alike. The computations are affected with precisely the same inherent and vitiating defects in the one case as in the other. Yet it is such computations that constitute the so-called "undisputed" testimony upon which appellants here rely to prove that unit costs on the lines which they have themselves selected, to-wit, the main lines between Washington and New York or Philadelphia, are higher than average unit costs on the respective systems as a whole.

### B—APPELLANTS' DESCRIPTIVE TESTIMONY OFFERED THROUGH OPERATING WITNESSES.

Still using as "typical" the lines from Potomac Yard to New York and Philadelphia, the Pennsylvania and the B. & O. offered descriptive testimony of operating witnesses pertaining to the physical handling of trains over the line and in terminals. They stress, in particular, their operations through "congested areas"; the numerous trains; grades and grade crossings and the like—all of

which are said to increase the operating expense on these particular lines (Appellants' original brief, pp. 55, 171).

Not one of these witnesses suggested or even intimated that either the Pennsylvania or the B. & O. is not *adequately equipped* with all necessary tracks, terminal facilities and organization for the efficient and expeditious handling of whatever traffic may be offered for transportation. Neither was it suggested that these facilities have in any sense reached the point of saturation from the standpoint of volume of traffic. Under such conditions these alleged operating difficulties can obviously be matters of no particular significance. It is well recognized, of course, that the efficient transportation of a large volume of freight may necessitate a greater capital outlay. The Commission expressly so recognized and stated in its report (R. 63). But when such capital outlay has once been made the item of necessary return upon investment remains constant. A large part of operating expenses chargeable to "maintenance of way and structures", "maintenance of equipment" and "transportation" likewise remains constant and unaffected by the number of trains or cars (R. 1522). The railroad's problem thereafter becomes one of securing all of the traffic that it can get, and the more traffic it secures the smaller is its operating cost per unit of such traffic.

It follows inevitably, therefore, that the enormous volume of all traffic which regularly passes over the Pennsylvania's line between Potomac Yard and Jersey City, or the B. & O.'s line between Potomac Yard and Philadelphia, reduces to an absolute minimum the actual cost of the transportation *per car* or *per ton* of freight *on these particular lines,* as contrasted with other lines on the respective systems (R. 1523). It would be a novel suggestion to say that any railroad in the country will not gladly make all necessary capital expenditures and perform all necessary train

operations if it can only be assured of securing the business.

The foregoing constitute the particular reasons why branch line operations, or operations on other lines of light traffic density, are generally recognized to be more expensive per unit of freight than operations on main lines having a heavy density of traffic. On the former lines the tracks and other facilities must be maintained even though only a few cars of freight are offered for transportation. Concrete examples illustrating this increased unit cost of such branch line and secondary main line operations were offered in this record as Knight's Exhibits K-8, K-9 and K-10 (R. 1527-32).

It may further be noted that the descriptive testimony and "opinion evidence" of appellants' operating witnesses were not expressed in terms of *actual cost* figures. On the contrary, both represent mere generalizations by the witnesses. Both also relate solely to the physical or surface handling of trains carrying citrus fruit or other freight, with no attempt to include all of the elements of operating expense as a whole, which latter would embrace the maintenance and upkeep of the tracks, structures and equipment (R. 1525).

### C—APPELLANTS' COMPUTED TERMINAL COSTS AT SUCH POINTS AS NEW YORK AND PHILADELPHIA.

With respect to certain computations of alleged terminal costs per car at New York, Philadelphia and other cities (Appellants' original brief, pp. 45, 46), it seems only necessary to observe that neither the Commission (R. 60) nor the court below (R. 250) recognized any accuracy in these compilations, although the same figures were offered in evidence before both tribunals. The worthlessness of these computed figures was fully shown at the hearings before the Commission (R. 1084, 1101).

C.

THE UNRELIABILITY OF APPELLANTS' COST CALCULATIONS IS SHOWN BY THE INEXPLICABLE AND IRRECONCILABLE RESULTS WHICH THEY OBTAIN AND DISPLAY IN THEIR OWN EXHIBITS.

Upon the face of appellants' exhibits of cost calculations —as placed before both the Commission and the District Court—it can be seen at a glance that these computations display nothing less than a veritable maze of incongruities.

The northern lines, as we have mentioned (p. 4, *ante*), have used in their studies certain selected cars of citrus fruit, as constituting "typical" hauls. With respect to these selected shipments their exhibits purport to show, among other things, the following:

Under the prescribed divisions neither the Pennsylvania nor the R. F. & P. is allowed, according to these exhibits, enough revenue to cover operating expenses and taxes. But in the case of the B. & O., on the other hand, the revenue on the 2,751 cars which the B. & O. handled from Potomac Yard *exceeded* the computed operating expenses and taxes by $13,368.97 (Hodkinson's Ex. No. 10).

The B. & O. and the R. F. & P. allege that the prescribed divisions north of Richmond are confiscatory as to both roads, both individually and when considered as one line. But from their own exhibits it appears that among others there were 221 cars of citrus fruit which the R. F. & P. and B. & O. transported from Richmond to Washington, D. C., for local delivery. The revenue which the Commission allowed north of Richmond is apportioned between the R. F. & P. and the B. & O. upon a voluntarily agreed basis. On these 221 cars the total revenue north of Richmond was $12,108.72. This figure exceeds the computed operating expense by $6,537.31, *or more than $29 per car.* In the ap-

portionment of this revenue the B. & O. received *$3,306.27*, although its computed cost was only *$311.61*. The R. F. & P. received $8,802.45 as against a computed cost for that line *of $5,259.80*. The R. F. & P. performs the entire haul from Richmond to Potomac Yard, and the B. & O. merely moves the cars from the north end of the yard across the river to Washington (Hodkinson's Ex. No. 10, p. 2).

The Chesapeake & Ohio Railway, an intervener before the District Court, is claiming that the prescribed divisions are so low as to be confiscatory of the property of that carrier. But, according to the separate exhibits respecting the divisions to central territory, the C. & O. transported during the test period 462 cars of citrus fruit from Cincinnati to Chicago. Its revenue on these cars was $31,663.59, or about $67 per car. Its computed expense is $50.01 per car, leaving *a surplus of $17 per car.* On another car which moved from Cincinnati to Columbus, O., this surplus was $35.79; on another car to Marion, O., $29.88; and on still another car which went to Muncie, Ind., the C. & O., according to its own calculations, earned *a surplus of $42.03* against a computed operating cost *of only $18.56* (Hodkinson's Ex. No. C-7, pp. 2, 5).

With respect to this particular appellant the District Court observed (R. 258):

> "It is noteworthy that the Chesapeake & Ohio Railroad, one of the intervening carriers claiming that the present order as to divisions is confiscatory, had a cost of only $50.01 per car on its haul from Cincinnati to Chicago in the past season, as compared with an average revenue of $67 per car. Moreover, this company had a net revenue of $8,206.41 in excess of operating expenses and taxes on all of its hauls in this season; *and a net revenue of less than $5,200 would have afforded a 5¾ per cent return.*"

On the combined total of 4,662 cars to central territory, as included in appellants' calculations, their own figures purport to show a *surplus* for the northern roads over operating expenses and taxes of $52,607.15. But on the 17,324 cars via Potomac Yard—most of which were handled by the Pennsylvania Railroad under the circumstances heretofore described—the cost calculations purport to show, on the contrary, a *deficit* to the northern roads of $53,469.79 (Hodkinson's Ex. No. C-7, p. 8, R. 869).

According to appellants' exhibits it would appear that the cost of transporting a car of citrus fruit from Cincinnati to Buffalo is $106.34 if the car moves via the Pennsylvania. But if the same car is handled between those points by the Erie Railroad, the computed cost is only $85.48, *or about $21 less,* although in the exhibits the distances are assumed to be the same via both routes (Hodkinson's Ex. No. C-3, p. 1).

According to the appellants' calculations it would appear that the operating expense per car per mile on all traffic on the Atlantic Coast Line Railroad is about 22 per cent less than the corresponding expense on the Pennsylvania system (Hodkinson's Ex. No. 1). But by an exhibit which these same northern roads filed at the hearings before the Commission it is shown that operating costs in general are higher in the south than in the east, and that the southern lines require a greater margin of profit per traffic unit than those in the eastern group. The Commission states in its report (R. 73):

> "In addition to the showing that operating costs are higher in the South it appears also that the southern lines require a greater margin of profit per traffic unit than those in the eastern group, *according to an exhibit introduced by defendants.*"

The foregoing are only a few, out of many others that might be mentioned, of the conflicting, inexplicable and irre-

concilable results which appellants obtain by the use of their own adopted method of computing costs. They are in large part attributable directly to the inherently fallacious and indefensible use, as a measure of the cost of the particular citrus fruit transportation here in question, of a computed *average* system cost of all freight of every description, moving under every conceivable condition, and passing indiscriminately over all lines, including both main lines and branch lines, and over all parts of large railroad systems, such as the systems of the Pennsylvania or the B. & O.

**2.**

**Both the Commission and the Courts Have Repeatedly Condemned the Use of "System Average" Unit Costs for Measuring the Costs of Transporting Individual Commodities.**

The fundamental and inherent fallacy in any attempt to determine by any such computations of "system average" costs the expense to a railroad of transporting a particular commodity or article of traffic—especially when the movement utilizes only a small portion of the total mileage of great railroad systems—has been pointed out and emphasized repeatedly by both the courts and the Commission. This fallacy inheres regardless of whether such computations are made upon a "car mile" or a "gross ton mile" basis. In no case has this fallacy been more clearly shown than in *Northern Pacific R. Co.* v. *Department of Public Works*, 268 U. S. 39, cited and quoted in southern lines' original brief (at p. 15). The Court held in that case that the Department's use of such system average unit costs for computing the operating cost of the log traffic

> "vitiated the whole process of reasoning by which the Department reached its conclusion."

In *Wood* v. *Vandalia R. Co.*, 231 U. S. 1, 58 L. ed. 97, the Court said, at page 5:

> "It is plain, however, that it does not follow from the mere fact that the total operating expenses of a railroad, or of a division of a railroad, bear a given relation to the entire receipts of that road or division, that the cost of transportation in the case of a particular class of traffic bears the same relation to the revenue derived from that class. The ratio, in the first case, is found by bringing together a great variety of operations involving various rates and different outlays for different sorts of traffic. It is predicated of the whole volume of business considered as such, and may be far from true of some part of it considered separately. It does not purport to be an expression of the relative cost of any specified part, but simply of that of the entire traffic to which it applies.
>
> "How hazardous may be the use of such a ratio to determine the relative cost of a fragment of the business is apparent in this case."

In *Iron Ore Rate Cases*, 41 I. C. C. 181, the shippers of iron ore had offered before the Commission certain cost studies with respect to the transportation of that traffic which were based upon the use of computed system average freight operating expenses of the carriers. The defendant carriers (and these included *both the Pennsylvania and the B. & O.*) strenuously objected to the use of such cost calculations, and the Commission refused to recognize the reliability of the shippers' studies. Among the particular grounds of the carriers' criticisms in that case, the following appear in the Commission's report (p. 281):

> "In addition to criticisms of the separation of operating expenses between freight and passenger services and the apportionment of freight expenses to the road-haul, terminal, and other services, the carriers offered other criticisms, some of which were

'That the method is in no sense a "cost" study, but merely a reapportionment of the total freight revenue of the carriers between iron ore and all other freight;

* * * * * * *

'That the method makes no provision for intermediate terminal and switching services when two or more lines are involved in the haul;

'That the method assumes the terminal costs to be the same for an empty as for a loaded car;

'That the method assumes that the percentage of empty haul for iron ore is the same as for all traffic;

'That the units or factors obtained by taking the entire operations of a railroad would not reflect the costs of transporting iron ore over a particular division of that road, although the method assumes that the operating conditions are the same on all divisions.' "

In *R. W. Burch, Inc.* v. *Railway Express Agency*, 190 I. C. C. 520, 197 I. C. C. 85 (cited and quoted in our original brief, p. 18), the Commission had refused to accept such system average unit costs for measuring the cost of transporting strawberries from Florida to the east *over the same lines* of the Pennsylvania and the B. & O. over which the citrus fruit moves north of Potomac Yard. That case had been decided only a short time before the appellants' second petition for rehearing before the Commission was filed in the instant case.

In the Florida Log Rate Case (*Georgia Public Service Commission* v. *A. C. L. R. R. Co.*, 186 I. C. C. 157), which is the case so strongly relied upon by the appellants, the Commission had the following to say, at pages 182 and 183 of the report:

"The unit cost figure of 0.0882888 cent per gross ton-mile was admitted by defendant to represent merely the average out-of-pocket expense of handling all traffic on the third division. It can not, therefore, be accepted as indicating the average out-of-pocket cost to

defendant of transporting logs in Florida. *Nor. Pacific Ry.* v. *Dept. Public Works,* 268 U. S. 39; *Calif. Growers' & Shippers' Protective League* v. *S. P. Co.,* 129 I. C. C. 25, 52."

From the Commission's report in the *Florida Log Case* it clearly appears that whatever sanction it may have given in that case to the use of average unit costs was grounded upon the particular and unusual facts of that case. They included the circumstance that transportation costs are in general higher in Florida than elsewhere on the Atlantic Coast Line system; and the Commission expressly stated (p. 184):

> "Ordinarily it would be unsound to use a system unit cost to determine the cost in a particular State, but since it is indisputable that unit costs are higher *in Florida* than elsewhere on the system, it seems clear that system unit costs may be used to find a cost that may be said to be less than the cost in Florida."

The report shows further that additional cost studies were submitted in that case, which included computations of the *actual* out-of-pocket expense based upon actual tests of the trainload movement of logs between Hines and Palatka (186 I. C. C. p. 181); that this calculation plainly showed that the unit out-of-pocket cost figure thus developed in connection with the Hines to Palatka movement is "below the average out-of-pocket cost of the Florida log transportation"; and the Commission further stated:

> "That movement, it must be remembered, was a regular one in trainload lots of 40 to 45 cars, and the cost of handling such solid trainloads direct between two given points without any intermediate train break-up in classification yards and without any switching en route, *is undoubtedly less than on single carload movements which are handled in ordinary pick-up service.*"

It is likewise in connection with trainload, or largely trainload, movements of citrus fruit from Potomac Yard that the prescribed divisions here under attack are applicable.

### A—THE COMMISSION'S REFERENCE TO THE PHRASE "THE ORDINARY RUN OF FREIGHT."

Appellants have relied greatly upon the Commission's observation in the report that the evidence "descriptive of operating conditions" indicates in general "that citrus fruit, like other perishable traffic, is given a specialized, expedited service which is undoubtedly more expensive than the ordinary run of freight" (R. 73). Indeed, they seize upon this expression in particular as an excuse for their use of system average unit costs in this proceeding.

The Commission here merely recognized the obvious fact that in general, *all other conditions being equal,* the physical handling of a given movement of citrus fruit or other perishable freight, including train operations over the lines and in terminals, entails upon the railroads more service, such as quick handling and delivery, special equipment, expedited schedules and the like, than does a similar movement of what is commonly referred to as "dead freight", such as lumber, coal, merchandise, etc. But the Commission was very far from meaning by this reference to the "ordinary run of freight" that the actual cost of a particular movement of citrus fruit, over a particular portion of a railroad's system—if such cost is statistically computed by including all of the elements thereof—is either the same as or greater than the *average* cost of all traffic of every description which such railroad handles on its system as a whole, including both main lines and branches. To draw any such conclusion from the Commission's above-quoted language would be to go directly counter to its frequently reiterated views upon this subject and its repeated rejec-

tion of such "system average" unit costs in numerous cases, including the cases cited above and others cited in southern lines' original brief (at p. 18).

With respect to this contention of the appellants the District Court stated as follows:

> "There are indeed many expressions of opinion in general terms that citrus fruit is more expensive to transport than 'the ordinary run of freight.' But the meaning of this phrase is uncertain, and we have no assurance that the cost of carrying the ordinary run of freight is the same as the system average car mile cost" (R. 259).

**B—THE USE OF "SYSTEM AVERAGE" COSTS VERSUS OTHER METHODS OF COST COMPUTATION.**

During the course of the former argument the question arose as to how it may be possible to prove the cost to a railroad of transporting a particular commodity when confiscation is alleged in respect to the prescribed rates or divisions on such commodity. The same question was raised also at the hearing before the District Court.

The inherent difficulties of this problem are well recognized. In the instant case the southern lines take the view that the problem is one which rests upon the *northern* roads, since the latter roads are here attacking the Commission's order. But the southern lines did suggest before the District Court a method which is far more reliable than any mere reliance upon computed system average unit costs. In the *Minnesota Rate Cases,* after referring to the practicability of securing data of a definite nature through the keeping of accounts or statistics over some properly selected test period, the Court said:

> "It may be said that this would have been a very difficult matter, but the company, having assailed the constitutionality of the state acts and orders, was

> bound to establish its case, and it was not entitled to rest on expressions of judgment when it had it in its power to present accurate *data* which would permit the court to draw the right conclusion." (Italics the Court's.)
>
> *Simpson* v. *Shepard*, 230 U. S. 352, 466, 57 L. ed. 1511.

Both Mr. Tassin, General Statistician of the Southern Railway (at R. 1479), and Mr. Lamb, the General Auditor of the Atlantic Coast Line (at R. 1422-23), showed the way in which such costs can be determined to the extent at least of a fairly reasonable approximation. It would involve a study of the trains in which the particular traffic moves, the inspection of train records, an actual riding of the trains if necessary, and in that way securing a basis upon which costs may be assigned to the particular transportation in question (R. 1479). Studies of that sort can be and are made frequently. Indeed, a study of that character was presented in the *Florida Log Rate Case, supra*, and it is described at length in the Commission's report in that proceeding.

The northern lines have seen fit to submit no such studies in the instant case. They have been content to rely upon what the court below characterized as "a statistical generalization of uncertain meaning" (R. 259). And the District Court accordingly stated:

> "We must take the case as we find it, and we can only say that the evidence does not convince us that system average freight car mile costs may be safely used to ascertain the cost of carrying citrus fruit" (R. 258).

It may be added that the real reason for appellants' failure to submit any such studies of actual train movements is very clearly apparent. The northern roads well know

that by no such checking of their actual train records could they build up costs *even approximating* their revenues under the prescribed divisions. They are well advised that in no conceivable way could they produce such actual costs, on one of the Pennsylvania's "M. D. 12" trains from Potomac Yard to New York, for example, which would even begin to approximate revenue of $5,000 or more from that one train alone, *or that would approximate even half that amount.*

## II.

## THE DIVISIONS HERE ALLEGED TO BE CONFISCATORY ARE IN EXCESS OF DIVISIONS WHICH APPELLANTS HAVE THEMSELVES VOLUNTARILY ACCEPTED.

### A.

### The Divisions Formerly Accepted by Northern Lines on the Florida Citrus Fruit.

The southern lines' complaint before the Commission, which resulted in the order here under attack, was filed with the Commission on November 22, 1930. Southern lines specifically alleged in this complaint that the lines north of the Virginia gateways, the appellants here, had arbitrarily, and over the strenuous objection of the southern roads, increased the proportions accruing north of those gateways in the division of the joint rates on the Florida citrus fruit; that the northern roads, "availing themselves of their strategic position as collectors of the freight" (*Alton R. Co.* v. *U. S.*, 287 U. S. 229), were enforcing this increase in their proportions by collecting the freight charges at destination and *retaining for themselves such increased amounts of the total revenue as they saw fit to retain,* leaving the balance to accrue to the roads south of the Virginia gateways; that the complainants, the southern roads, had then already, during the intervening period subsequent to November 9, 1928, been deprived in this manner and for this reason of large amounts of revenue to which they were rightfully entitled and of which they were urgently in need; and that the amounts of these revenue losses were being progressively increased with the passage of each successive shipping season for the Florida citrus fruit.

The southern roads further alleged and showed before the Commission that the northern roads had thus demanded

and enforced increased divisions in entire disregard of the facts and circumstances set out below, namely:

1. That prior to November 9, 1928, the joint through rates had been divided for a period of about twenty years upon a mutually agreed and established basis of divisions, *which agreement had never been abrogated or changed in any way;*

2. That under these mutually agreed divisions the northern roads received certain fixed proportions, commonly termed "specifics", the amounts of which had originally been *named and fixed by those roads themselves* as the amounts which they would expect to receive, and would accept for their hauls north of the Virginia gateways, regardless of what through rates might be applied from origin to final destination;

3. That there had been no increase in the through rates themselves, but on the contrary, effective November 9, 1928, the through rates *were reduced,* in pursuance of the decision and order of the Commission in *Florida Railroad Commissioners* v. *A. & R. R. Co.,* 144 I. C. C. 603.

**A—THE COMMISSION'S FINDINGS RESPECTING THE DIVISIONS FORMERLY ACCEPTED BY THE NORTHERN ROADS AND THE DIVISIONS WHICH THOSE ROADS EXACTED AND RETAINED WHEN THE JOINT RATES WERE REDUCED.**

The extent to which the above allegations made by the southern lines were in every respect substantiated at the hearings before the Commission will appear from the Commission's findings of fact, as set forth in its two reports in this proceeding. The Commission states (R. 43):

"For a number of years there have been joint class and commodity rates between the South and New Eng-

land trunk-line territory, and they were formerly arrived at by adding to the amounts fixed by the southern carriers for their service south of the gateways, such as Richmond, Va., certain divisions, known as 'specifics', because they were stated in specific amounts, *established by the northern lines.* The specifics for citrus fruit were stated in amounts per box".

The Commission points out that this method of dividing the citrus rates originated about 1890; reviews in the report such changes as were made in particular instances during the period prior to 1908; and expressly states, with respect to the manner in which the through rates were arrived at during this period, that:

> "The through rail rates were at that time determined by the southern lines *after the northern lines had advised them what division was acceptable for the haul north of the gateways"* (R. 44).

The Commission further refers in the report to the revision and reduction in the through rates which was made in 1908-1910, pursuant to its orders in proceedings decided during that period, together with the reasons for requiring these reductions, and states as follows (at R. 44):

> "In *Fla. Frt. & Veg. Shprs. Protect. Asso.* v. *A. C. L. R. R. Co.,* 14 I. C. C. 476, 17 I. C. C. 552, and 22 I. C. C. 11, the first report having been adopted in 1908, we prescribed reduced proportional rates from Jacksonville and other so-called base points to eastern destinations. It was there stated that the then existing rates, especially those to interior points and points north of New York, were too high, *and that the excess was mainly due to the excessive divisions received by the lines north of Richmond.* Nevertheless the basis of divisions of the reduced rates agreed upon by the two sets of carriers, represented a revenue prorate, namely, use of the former divisions as prorating factors, a fact strongly stressed by complainants as a precedent for

similar action here. *The divisions then established remained unchanged until November 9, 1928, except for modifications reflecting the general increase of 1918 and 1920 and the general reduction of 1922.*"

The Commission likewise reviews the situation which arose when the through rates were again reduced, effective November 9, 1928, under the decision and order in *Florida Railroad Commissioners* v. *A. & R. R. Co.*, 144 I. C. C. 603. The Commission points out that "complainants proposed to defendants that each group of carriers shrink their revenues proportionately to the aggregate reduction, dividing them on a revenue prorate"; that to this proposal the northern roads declined to accede; and with respect to the increased divisions which those roads exacted and retained out of the reduced through rates, and the amount of revenue which was thus being withheld from the southern roads, the report states as follows:

> "Complainants refused to agree to defendant's demands, but have been under the practical necessity of settling accounts for the time being on the basis offered by defendants, because freight charges on citrus-fruit traffic are ordinarily collected at destinations, and defendants are thus in a position to withhold the revenue to which they consider themselves entitled. According to a test covering the period from November 9, 1928, to June 30, 1929, hereafter designated the 1928-29 test period, defendants retained in this manner an average of 78 cents per ton more then they would have received under the former rates and divisions on traffic to New England trunk line territory. Since these rates were reduced 35 cents per ton on the average, as before indicated, the net average reduction in complainants' gross earnings on this traffic thereby became $1.13 per ton. Complainants estimate that in the three shipping seasons between 1928 and 1931 defendants thus received an increase of $1,215,510 over the amount which they would have received on an equivalent movement under

the former rates, whereas complainants' revenues on the same traffic have been reduced to the extent of $1,761,420" (R. 45).

**B—THE INCREASED DIVISIONS WHICH NORTHERN ROADS WERE ACCORDED UNDER THE COMMISSION'S ORDER.**

In fixing the reasonable divisions for the future the Commission reached the conclusion, for reasons set out in the report (R. 76), that such rate reductions as resulted from the order in the rate case, *Florida R. R. Comm.* v. *A. & R. R. Co., supra,* should be absorbed by the *southern* lines, and that certain additional matters should be taken into account in favor of the northern roads (R. 76). The prescribed divisions were accordingly determined with that end in view. As a matter of fact the southern roads were required, under the adopted plan, not only to stand the entire amount of the rate reductions but actually to contribute even more revenue to the northern roads out of the reduced rates (Doss' Ex. No. 1, R. 1489-92). The result was that the roads north of Richmond and Potomac Yard were accorded divisions which on the whole represent *increases* over the divisions that they had for years accepted voluntarily prior to the reduction in the rates. To New York City, based upon the 1928-29 test period movement, the resulting increase in revenue to the northern roads would amount to *more than $102,000 annually* (R. 1492). To certain other destinations there were reductions, the revision in the divisions following in this respect the revision which had previously been made in the rates. But with respect to the results in the aggregate the Commission states as follows in its second report (R. 87):

"The plan of our prescribed divisions departs broadly from that of the former divisions. So far as we are able to estimate from data of record, it would afford the northern lines more revenue than they would receive

> under the former basis of rates and divisions, *and this is not denied in their petition.*"

It is particularly noteworthy in this connection that the points to which the northern roads received the largest revenue increases were such points as New York, Philadelphia and Baltimore. To New York the Commission even increased the divisions over what the northern roads *had fixed themselves and retained from and after November 9, 1928* (Hodkinson's Ex. No. 2, p. 7). Yet the two roads which were the particular beneficiaries of such increases, namely, the Pennsylvania and the Baltimore & Ohio, are here alleging that their prescribed divisions are confiscatory and that those divisions were "arbitrarily" made by the Commission.

The District Court also stated (R. 257):

> "Very great emphasis is placed upon the past experience of the parties in handling the traffic, and upon the historic fact that the northern lines for a period of twenty years prior to November 9, 1928, when the Florida case was decided, voluntarily accepted a return for their services less than the revenues which accrued to them under the divisions prescribed by the Commission. During the shipping season of 1928-1929, all northern lines in the aggregate, received upon 29,193 cars in trunk-line and New England territory, $62,835.90 more than they would have received under the divisions previously in force."

It thus clearly appears that the appellants are here alleging confiscation in respect to divisions *which exceed the divisions that they had themselves voluntarily accepted for years.* It can avail these carriers nothing to come forward now with the assertion that they had frequently "expressed dissatisfaction" with their former divisions (Appellants' brief, p. 8). If the northern roads were dissatisfied the

doors of the Commission were at all times open to them. But instead of adopting the orderly procedure of petitioning the Commission to fix new divisions if they were dissatisfied the northern roads elected, on the contrary, *to fix new divisions themselves.* Furthermore, they proceeded to enforce such new divisions by strong-arm methods and by the simple expedient of collecting and pocketing the money. As the Commission states (R. 71):

> "The amounts now received by the southern lines from this citrus fruit traffic *have been fixed solely by the defendants,* 'availing themselves of their strategic position as collectors of the freight,' as the Supreme Court described the situation of these lines in *Alton R. Co.* v. *United States,* 287 U. S. 229, 236."

The northern roads continued, moreover, to enforce such increased divisions for themselves with the passage of each successive shipping season for the Florida citrus fruit, and during the protracted litigation that commenced with the complaint which the southern lines were finally compelled to file with the Commission, as a last resort and after exhausting every effort to reach an amicable settlement of this controversy. Appellants are here asserting that the enforcement of the Commission's findings will mean the payment by them of large amounts of money to the southern roads. *It is money that has rightfully belonged to the southern roads all the time.* Both the Commission and the District Court have so found after protracted hearings before both tribunals.

Neither can appellants find justification or excuse in references to their alleged failure to receive certain increases in rates and divisions in 1915 and 1917 under the *Five Per Cent Case,* 31 I. C. C. 351, and *Fifteen Per Cent Case,* 45 I. C. C. 303; or certain increases to which they conceived themselves entitled under *Increased Rates, 1920,* 58 I. C. C.

220; or in such amazingly inaccurate assertions on brief as that the northern roads increased their divisions "upon the assumption, and *the assurance of Southern lines,* that the estimated weight of 80 pounds was ample to cover the average actual weight per box of all citrus fruits" (Appellants' brief, p. 9). Those matters were all threshed out at length before the Commission and are referred to in the original report (R. 46, 47, 50). With respect to the rate increases of 1915, 1917 and 1920, the Commission states:

> "Complainants reply that the eastern lines were unwilling to consent to increases in the all-rail citrus rates from Florida under the 5 and 15 per cent increases unless the California rates and the Florida water-rail rates were increased, and this being so that there was no justification for increasing the divisions. They also point out that the method of applying the increases in the interterritorial rates in 1920 to the divisions was not passed on by us" (R. 50).

With respect to the weight of a box of Florida citrus fruit it was fully shown before the Commission and stated in its report that the average actual weight—as well known by the northern lines and all others concerned—*is 90 pounds per box and has been since at least as far back as the year 1908* (R. 325-329). The Commission accordingly said:

> "It may be assumed, therefore, that the northern lines had knowledge of the 90-pound box weight in 1908 when they agreed upon the divisions of the rates prescribed in the case cited. The fact now stressed by them, that in arriving at divisions prior to 1908 they had proceeded on the belief that the weight per box was 80 pounds, is of slight importance" (R. 47).

The Commission, in fixing the new rates which became effective November 9, 1928, had itself used a weight of 90 pounds per box, as will appear from its report in *Florida*

*R. R. Comm.* v. *A. & R. R. Co., supra,* and the northern roads were thoroughly well informed of that fact.

Appellants can find no avenue of escape from the devastating force of the evidence of their own actions. They are here alleging confiscation respecting divisions that exceed the proportions which they had themselves originally named as their reasonable share of the joint rates and had thereafter accepted voluntarily for years.

As the Court said in *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 491, 62 L. ed. 831:

> "The evidential effect of the Railway's voluntary action is obvious."

And in *Dayton P. & L. Co.* v. *Public Utilities Commission,* 292 U. S. 290, 312, 78 L. ed. 1267, the Court said, speaking through Mr. Justice Cardozo:

> "Men do not transact business without protest at confiscatory rates, at all events in the absence of extraordinary circumstances making submission to the loss expedient. If such circumstances exist, the appellant has not proved them. Nothing in the record lays the basis for a belief that the natural gas business in Ohio is unable to pay its way. *That being so, what the public utility has done belies what it has said. We shall hardly go astray if we prefer the test of conduct.*" (Italics supplied)

**B.**

**Divisions Voluntarily Accepted by Appellants on California Citrus Fruit.**

The court below also stated in its opinion (R. 258):

> "The willingness of the northern lines to accept voluntarily the prevailing divisions on California citrus fruit is not without significance. The Pennsylvania and the New York, New Haven and Hartford Railroads ac-

cept on the movement of California oranges considerably less revenue than they receive for similar movements under the prescribed divisions on Florida citrus fruit, and it appears that if the expenses on California fruit are determined on the car mile basis, these roads suffer even larger deficits in this respect than those of which they complain in the pending case."

Under the divisions which they are here claiming to be confiscatory the Pennsylvania and R. F. & P. are accorded revenue of $82.80 on a 36,000-pound car of Florida citrus fruit for their haul from Richmond to New York. The distance is 354 miles. But the Pennsylvania is at the present time participating voluntarily in divisions on California citrus fruit under which it receives far less revenue on a similar car for a haul of the same distance. On a car moving from California to Philadelphia, if it passes through Chicago and Pittsburgh, the Pennsylvania voluntarily accepts *only $66.96* for its haul from Pittsburgh to Philadelphia, distance 357 miles.

The New Haven Railroad operates a line between New York and Boston. If the New Haven delivers a car of citrus fruit at Boston it is moved by that road over precisely the same line between New York and Boston regardless of whether it originates in Florida or California. The divisions prescribed by the Commission north of Richmond on the Boston traffic are apportioned between the R. F. & P., Pennsylvania and New Haven on a basis agreed upon among themselves. Under this agreed basis the New Haven receives $66.96 per car for hauling a car of Florida oranges from New York to Boston. But the New Haven is voluntarily accepting *only $47.88* for hauling a similar car of California oranges from New York to Boston, although its own haul is precisely the same in both cases.

The above figures are taken from Doss' Exhibit No. 6 (R. 1502). They were offered before the Commission

and again before the District Court, and they stand uncontradicted and undisputed in this record. The illustrative cases above referred to are only two out of many others which appear in this exhibit.

That railroads frequently participate voluntarily in low rates or divisions for competitive or other reasons is well recognized. But no railroad may lawfully engage in the transportation of any traffic upon which it fails to earn at least some margin of profit. If it does, it thereby places an undue burden upon other traffic in the maintenance of an adequate transportation system in the public interest. For this reason the Commission is in terms prohibited from granting relief under the so-called "long-and-short-haul clause" (Section 4 of the Act) if the rate to the more distant point is "not reasonably compensatory for the service performed." For the same reason the power to prescribe minimum rates was conferred upon the Commission by the 1920 amendment of the Act. *Ex-Lake Iron Ore from Chicago,* 123 I. C. C. 503; *Export and Import Rates to and from Southern Ports,* 205 I. C. C. 511, 210 I. C. C. 525.

It must be recognized, therefore, that appellants' above-mentioned divisions on California citrus fruit are sufficient to yield them some margin of profit. But they are here alleging actual confiscation respecting the *very much larger* divisions which they are accorded on the Florida citrus fruit, under the Commission's order in this proceeding and under their own agreed apportionment of such divisions among themselves.

Here again, therefore, it appears that "what the public utility has done belies what it has said" (*Dayton P. & L. Co. Case, supra*).

## III.

## THE DIVISIONS PRESCRIBED FOR THE NORTHERN AND SOUTHERN ROADS, RESPECTIVELY, ARE NEITHER DISPROPORTIONATE IN AMOUNT NOR DO THEY IN ANY PARTICULAR REFLECT ARBITRARY ACTION BY THE COMMISSION.

In southern lines' former brief (at pp. 28 and 31) there are discussed, together with the supporting authorities, the two additional points upon which these appellees are here relying, namely:

1.

*"Confiscation Is Not Established in Respect to a Large Group of Separately Operated Railroads, as a Whole, by Evidence Which is Limited to a Few Individual Roads Within Such Group."*

2.

*"In Making the Order the Commission Did Not Act Arbitrarily or in Disregard of the Requirements of Section 15(6) of the Interstate Commerce Act."*

The general rule that upon an issue of reasonableness of rates or divisions the Court will neither undertake to weigh the evidence before the Commission nor concern itself with the "correctness of the Commission's reasoning" or the "soundness of its conclusions", *Virginian R. Co.* v. *United States*, 272 U. S. 658, 666, is too well settled to be open to question. Appellants, however, would now have it appear that the divisions allowed northern and southern lines, respectively, are so greatly disproportionate in amount as to lead to the conclusion that they were "arbitrarily" made and therefore represent a denial of due process. We will

mention, therefore, a few of the outstanding facts found by the Commission which conclusively negative any such suggestion.

1.

**The Divisions Are in No Sense Disproportionate When All Elements of Reasonableness Are Considered, As Enumerated in Section 15(6) of the Act.**

The Commission fully recognized and stated that if "judged solely by a mileage prorate" (R. 72) the northern lines' proportions would appear to be low. But the reports show that the Commission also took into account other elements than mileage, as it was in duty bound to do under the mandate of the statute. *Brimstone R. & C. Co.* v. *United States,* 276 U. S. 104, 72 L. ed. 487.

It may here be mentioned that even from the standpoint of mileage alone there is in fact no such general relationship between the northern and southern divisions as that which appellants have alleged in their bill of complaint, and have again asserted on brief in the following language:

> "For equal hauls north and south the southern factors are very materially higher than the northern factors. For 700 miles on each side the factors are 176 south and 99 north, a ratio of 1.77 to 1 (R. 82). Expressed in percentages this means that for equal hauls north and south of 700 miles, Southern lines will get 64 per cent of the revenue and Northern lines but 36 per cent. To receive the same revenue as Southern lines receive for 700 miles, appellant Northern lines would have to handle the traffic a distance of 1350 miles, or almost twice as far" (Appellants' original brief, p. 16).

The inference which appellants are here seeking to create is unwarranted. From a practical standpoint the comparison as made falls very far short of portraying the real picture

because the fact is, as the Commission found, that "the respective hauls in the two territories *are far from equal*" (R. 82). With respect to the weighted average *actual* hauls north and south, the Commission found, using the entire test period movement and taking Lake Wales, Fla., as a representative shipping point, that the average actual hauls via the Virginia gateways were, south 853 miles; north only 372 miles, which is approximately the mileage from Richmond to Altoona, Pa., and only slightly in excess of the mileage from Richmond to New York (R. 55).

Using these average actual hauls, and first deducting the so-called "Florida arbitrary" in conformity with the Commission's order, the ratio above referred to becomes only 1.308 to 1 instead of 1.77 to 1. In other words, the divisions reflect a valuation of a mile of transportation in the south, a substantial portion of the haul being in the Florida peninsula, as equivalent to *only 1.308* miles of transportation north of Richmond (R. 1497).

**A—THE SO-CALLED "FLORIDA ARBITRARIES" NEITHER REPRESENT NOR WERE INTENDED TO REPRESENT COMPENSATION FOR THE ENTIRE HAUL IN THE FLORIDA PENINSULA.**

Appellants have advanced no contention that the so-called "Florida arbitrary", which under the order is to be deducted before prorating and added to the southern lines' divisions, either represents or was intended to represent compensation for the entire transportation in Florida south of Jacksonville. "Florida arbitraries" are used in constructing class rates, as well as commodity rates in general, to and from the Florida peninsula. They are a part of a general scheme of rate construction which the Commission adopted in *Southern Class Rate Investigation,* 100 I. C. C. 513. In that proceeding the Commission fixed certain basic mileage scales of rates to be applied generally

throughout the south. But in recognition primarily of (1) the peninsular shape of the state of Florida which prevents the railroads from obtaining any transstate or overhead traffic; and (2) the relatively light density of all traffic in the peninsula, being only about one-half of that for the balance of the south, the so-called "Florida arbitraries" were added in constructing the mileage rates to and from the peninsula. For example, in constructing the class rates from Atlanta, Ga., to Orlando, Fla., the rate is first computed on basis of the southern class rate mileage scale for the through distance from Atlanta to Orlando. There is then added a "Florida arbitrary", the amount of which is based upon the length of the haul in the Florida peninsula south of the Jacksonville-River Junction line of the Seaboard Air Line Railway.

When the Commission prescribed revised rates on citrus fruit in *Florida R. R. Comm.* v. *A. & R. R. Co., supra,* the citrus fruit rates to points north of Richmond and Potomac Yard were made a fixed percentage of corresponding class rates. The resulting "Florida arbitrary" on citrus fruit, for the average haul of 200 miles south of Jacksonville, is only about *6 cents per 100 pounds*—a figure which obviously hardly begins to compensate the Florida railroads for the expensive service of "picking up" and assembling cars of citrus fruit in the loading areas in the peninsula and transporting them for an average distance of 200 miles within the peninsula (R. 1487).

**B—CONSIDERATIONS OTHER THAN MILEAGE WHICH ENTER INTO THE REASONABLENESS OF THE DIVISIONS.**

The following are some of the elements of reasonableness of the divisions to which the Commission properly gave consideration "without regard to the mileage haul" (section 15(6) of the Act):

**Relative Importance of Citrus Fruit Traffic to Northern and Southern Roads.**

The Commission found, as shown by undisputed evidence, that during the period 1928-31 the Atlantic Coast Line was dependent upon its citrus fruit traffic alone *for 13.6 per cent* of its entire freight revenue; the Seaboard Air Line for *9 per cent;* and the Florida East Coast Railway *7.5 per cent* (R. 74). As contrasted with these figures "in the eastern group only *0.36 per cent of* the gross freight revenue came from citrus fruit" (R. 74). For the Pennsylvania individually the corresponding figure, even including the California citrus fruit, was only *0.48 per cent* and for the B. & O. only *0.41 per cent* (R. 1424). In other words, citrus fruit is a far more important source of revenue to the three Florida roads which principally participate in the movement south of Richmond than it is to such roads as the Pennsylvania or the B. & O.

**General Rate Levels in the South vs. the North.**

The Commission took into account the relatively higher general rate level in the south as a whole than in the north, as well as the even higher general level of all rates in the Florida peninsula. After reviewing at length the statistical evidence bearing upon this subject the Commission concluded that taking into account all rates and all traffic, including both class rates and commodity rates, this actual difference in general rate levels could not be expressed in concrete figures. But the Commission stated:

> "To sum up, we fail to find any figures in the record which serve satisfactorily as an index to the general rate levels in the two territories, although the record supports the statement we have made in other proceedings to the effect that the southern rate level is higher, probably by more than the 5 per cent difference estimated by defendants" (R. 66).

With respect to class rates, as distinguished from commodity rates, the Commission found in *Eastern Class Rate Investigation,* 164 I. C. C. 314, 393, that the prescribed first class rates for the east are only about 72 per cent of those prescribed for the south in *Southern Class Rate Investigation, supra.*

**The Expensive Gathering Service in the Florida Peninsula.**

The Commission stated (R. 55):

> "Complainants' (the southern roads) operating testimony clearly indicates that the transportation of citrus fruits from Florida is much more costly than that of the general run of traffic. This is due to the wide distribution of production before mentioned and the necessity of providing daily service from all origin points, which differ widely in volume of shipment."

The report describes at length the expensive service which the originating Florida roads must perform in the peninsula in "picking up" and assembling cars of citrus fruit, some of the important items of this expense being the following:

(a) *Placing empty cars and assembling loaded cars at numerous loading stations in widely scattered producing areas.* For example, it is pointed out in the report that on the Atlantic Coast Line alone citrus fruit originated in the 1928-29 test period "at 139 different stations"; and that "slightly more than 50 per cent" originated upon what may be termed branch lines (R. 54);

(b) *The wide fluctuations* in the volume of movement from week to week and even from day to day, concerning which the Commission stated (R. 55):

> "The movement begins in small volume in September, increases rapidly in November, and rises steadily

to a peak in December, receding somewhat thereafter but continuing in fairly well-sustained volume until the latter part of April, when it begins to fall off rapidly and ceases in June. But even in months of heaviest movement the loadings of the Atlantic Coast Line sometimes vary from day to day by as much as 75 cars, because of weather and market conditions. The carriers have no advance notice of these fluctuations but must be prepared to handle all fruit offered on scheduled movement, running special trains, if necessary, to place empty cars and move them immediately after loading. *Instances are cited where special trains have been run 75 miles with one or two cars of citrus fruit, and these are said to be of frequent occurrence.*"

(c) The change by shippers to the use of refrigerator cars, instead of ventilated box cars formerly used "of which the Seaboard Air Line and the Atlantic Coast Line own more than 25,000 and which are not well adapted to carriage of other traffic" (R. 56). This use of refrigerator cars, the Commission stated

"complicates the problem of car supply, for empty refrigerators must be brought in from the North, sometimes in special trains all the way from the northern gateways, and often special trains of empties numbering from 1 to 40 cars must be run to various sections of Florida to meet sudden demand" (R. 55).

And further:

"The increased use of refrigerator cars has added to the carriers' operating costs through additional train and switching service in loading districts, increased per diem costs, empty mileage, larger deadweight tonnage in relation to revenue load, as well as to losses to the originating carriers in their investment in ventilated box cars" (R. 56).

**Train Operations South of Richmond.**

The Commission found that because of the "widespread practice of diversion" the southern roads are prevented "from making up solid trains at or near concentration points and running them through to the principal junction points" (R. 56). The Commission further stated:

> "To a very limited extent complainants operate trains consisting entirely of citrus fruit south of the Florida gateways, *but from the latter to Richmond they operate no such trains, nor do they have solid trains of perishable freight,* presumably because of lack of sufficient freight of that character to utilize fully the available motive power for the train. Cars containing other kinds of high-grade freight suitable for expedited movement are therefore used to fill out the trains to the tonnage rating, if possible" (R. 56).

It was shown that "nearly 50 per cent of all cars shipped are now diverted more than once on the average" and that "the principal diversion points are Waycross and Savannah, Ga., but there are many others" (R. 56).

There were filed before the Commission the actual records of typical train movements south of Richmond. They illustrate the utter impracticability, because of the numerous diversions and reconsignments of cars, of operating anything even resembling "solid trains" of citrus fruit or other perishables except for short distances between intermediate terminals.

As illustrative, a particular Atlantic Coast Line train left Lakeland, Fla., with 49 cars of citrus fruit and 2 other cars. At Trilby, 34 miles north, 7 additional cars of citrus were picked up and the 2 "other" cars were set off and the train then proceeded northward. This train was again broken up at High Springs, Fla., and 54 of the 56 cars moved therefrom to Waycross, Ga., in two separate trains.

Diversions had to be made at Waycross; again at Savannah, Ga.; again at Florence, S. C.; and again at South Rocky Mount, N. C. The result was that of the 56 cars of citrus fruit which originally left the loading territory in Florida *only 17 cars* finally moved through to Richmond, Va., and these 17 cars arrived at Richmond *in four different trains and on different dates* (R. 452-4).

When train operations of this sort are contrasted with the Pennsylvania's "M. D. 12" train operations from Potomac Yard, as heretofore described, the tremendous disparity in actual operating expense can readily be perceived.

**Traffic Density in the Respective Territories.**

With respect to the important element of traffic density, as bearing upon the general expense of railroad operation, the Commission pointed out that the population of the southern states is "only about one-third" that of the states north of the Ohio and Potomac rivers; that the density of traffic in the south as a whole is less than half of that in the north; and with respect to the traffic density on the Atlantic Coast Line and Seaboard Air Line, particularly in the Florida peninsula, the Commission stated:

> "Complainants point out that the traffic density in Florida is much lower than that of the remainder of their systems, the Florida density of the Atlantic Coast Line in 1929 being 50 per cent of that for the rest of the system. On the Seaboard Air Line the percentage is 52. In several cases we have approved the addition of arbitraries for the Florida peninsula in recognition of this light density, among other elements. *The traffic density of the Pennsylvania, which is the principal carrier of citrus fruit in official territory, is 549 per cent of that of the Atlantic Coast Line, which is the leading southern carrier of this commodity.*" (R. 63).

**Revenue Needs of Southern vs. Northern Roads.**

As one of the principal grounds of attack upon the Commission's order, appellants are here asserting that the Commission "arbitrarily" subordinated all other elements of reasonableness to the "southern lines' supposed financial need" (Appellants' brief, p. 139). That the Commission did consider this element, as it is specifically directed to do by the statute, is apparent from a reading of the report. But to say that the Commission "subordinated" all other elements of reasonableness to this one matter of financial needs is simply to ignore and cast out of view the plain language of the Commission's reports. The original report discloses that this matter of financial needs was accorded no greater degree of prominence in the Commission's review of the evidence than were the other elements which are enumerated in the statute. There appears in the report a table (R. 69) contrasting the rates of return of northern and southern roads, respectively, in the 1928-29 test period; and at a later point the Commission said:

> "In 1926 the volume of rail traffic in the South reached its peak for the period 1922-31, and this was also true of the traffic of the eastern group. Thereafter a recession set in which has been more declivitous in the South, resulting in a decrease of 38 per cent in 1931 under 1926, compared with 31 per cent for the eastern group. The Florida lines have been much more seriously affected, *their average decrease being 45 per cent*" (R. 75).

The Commission added that in this respect the trend of the citrus fruit movement had been opposite to that of traffic in general, the result being that "the relative importance of citrus fruit to the southern carriers, particularly the Florida lines, has been much enhanced by these opposing trends" (R. 76).

This same contention about financial needs was advanced by appellants in their first petition for rehearing before the Commission. In the report upon reconsideration the Commission stated as follows:

> "During the first 10 months of 1933 the Pennsylvania's rate of return was 2.4 per cent and that of the Atlantic Coast Line, 1.4 per cent, *the former being 71 per cent greater.* In the same period it is of interest to note that the rate of return *of the Seaboard Air Line was 0.8 per cent, and the Florida East Coast had a deficit*" (R. 91).

The Commission, in other words, did find that the revenue needs of the Florida railroads were extremely acute. It was fully justified in giving due consideration to that fact when apportioning the revenue, through the medium of divisions, upon a commodity on which those roads are so largely dependent for the revenue necessary to enable them to provide adequate transportation service in the public interest.

The foregoing are but a few of the outstanding facts found by the Commission which bear directly upon the reasonableness of the prescribed divisions. Many other such facts appear both in the record and in the Commission's two reports. They suffice to show that the amounts of the prescribed divisions are very far from representing "arbitrary" action by the Commission. They show further that these divisions are in no respect either unreasonable or disproportionate.

Appellants have attached great weight to the circumstance that when the report of the Commission was issued there were four dissenting Commissioners (Appellants' brief, p. 17). This dissenting report discloses no intimation that any of the Commissioners took the view that the majority report reflected either "arbitrary" action, or

any disregard of the applicable rules of law. On the contrary, this dissenting report expresses merely a difference of opinion upon the question of reasonableness, as based upon judgment respecting the weight of the evidence before the Commission, a matter with which the courts are not concerned, *Virginian R. R. Co.* v. *U. S., supra.*

2.

**The Divisions Prescribed for Southern Roads Yield No Such Exaggerated Rates of Return to Those Roads as Appellants Have Computed and Alleged.**

There appears in the bill (R. 18) and again in appellants' original brief on this appeal (at p. 87) a table which purports to contrast for the northern roads, on the one hand, and the Atlantic Coast Line and the Seaboard Air Line, on the other, the amounts available for return on investment under the prescribed divisions. Based upon these computed figures appellants advance the following statement on brief:

> "This record shows that under the prescribed divisions Southern lines, based on the 1928-29 shipping season, will have available in the aggregate for return on investment the sum of $1,767,078.86 in excess of estimated expenses, plus car rental and taxes, equivalent to a 12.95 per cent return" (Appellants' original brief, p. 30).

Appellants also greatly stress their assertion that in computing the alleged operating cost for northern and southern roads, respectively, they have in both cases used "exactly the same formula for determining expenses" (Brief, p. 24).

In discussing the subject of "financial needs" the court below states as follows, referring to these same calculations:

> "This contention depends largely on the calculations of the petitioners, *made on the basis that we have found to be untenable,* from which they conclude that the Commission's order gives to the southern lines abnormally large divisions far in excess of a fair return on their investment, while reducing the northern lines to a point at which nothing is left for such return" (R. 261).

In other words, what the District Court correctly found and stated was that a computed "system average car mile cost" is no more representative of the actual citrus fruit cost to the Atlantic Coast Line or the Seaboard Air Line than it is to the Pennsylvania or the B. & O.

The very figures which appellants produce and rely upon sufficiently illustrate the point. By using such system average costs as purporting to represent the actual citrus fruit cost appellants adroitly succeed in *inflating* the alleged citrus fruit cost on the Pennsylvania, for example, for the reasons previously stated herein. They inflate this alleged citrus fruit cost on the Pennsylvania's lines from Potomac Yard to New York with that carrier's cost of assembling coal cars at the mines; with its cost of its "pick-up" and gathering service on fruits and vegetables in the various producing areas on its entire system; with the enormous expense of switching at every large city on its lines, as well as in numerous other ways hereinbefore enumerated.

But by the same process of using a "system average car mile cost" for the Atlantic Coast Line, for example, they succeed in *deflating* that carrier's actual cost of the citrus fruit transportation on its lines over which the citrus fruit actually moves. The effect of using such system *average* figure is to pull down the computed cost attributable to the Coast Line's exceptionally expensive "gathering service" in the Florida peninsula; as well as its exceptionally ex-

pensive train operations as a whole in the citrus fruit transportation, as above described, which the Commission said is "much more costly than that of the general run of traffic" (R. 55). The Atlantic Coast Line, moreover, as contrasted with the Pennsylvania, is without such numerous and large cities on its lines at which the switching and other terminal expenses would have the effect of increasing the average system cost as computed on a car mile basis. Furthermore, the "composition of traffic" in general in the south is widely different from what it is in the north, as the Commission expressly states in its report (R. 65).

All of these differences are necessarily reflected in a computation of average system car mile costs. They cause such computed costs to be meaningless in the case of the Atlantic Coast Line, just as they are in the case of the Pennsylvania, if used to measure the actual cost of the citrus fruit transportation. In either case such computed system averages prove literally nothing at all respecting the actual amount of the citrus fruit cost.

With respect to appellants' computed rates of return on investment, the District Court also said:

> "It was also necessary to ascertain the investment in road and equipment used in the service in order to calculate the proper return on investment to which the carrier was entitled, and for this purpose, to ascertain the freight proportion of the total investment of the carrier. This was done by taking the total investment as reported to the Commission and computing the freight proportion thereof by applying to the total the percentage which the net operating freight expenses, obtained in accordance with the above mentioned formula, bore to the total operating expenses. In other words, the investment allocated to freight was determined by the ratio that the net operating expenses for freight bore to the total operating expenses" (R. 247).

And further (R. 253):

> "These figures are estimates only, since, as we have noted, the freight proportion of investment was calculated *by arbitrarily assuming that it bears the same ratio to total investment as the freight expenses bear to the total expenses.*"

Completely disregarding every requirement of consistency appellants first charge that the Commission, when considering "financial needs" as an element of reasonableness of divisions, arbitrarily and erroneously considered southern lines' respective rates of return from their business as a whole, instead of rates of return upon "property fairly apportionable to the transportation of citrus fruit" (Bill of complaint, R. 19). But appellants then proceed, notwithstanding, when computing southern lines' alleged rates of return from the prescribed divisions, to attribute to the citrus fruit transportation the total investment apportioned to *freight operations in their entirety.* Furthermore, they make for this purpose a purely arbitrary apportionment between freight and passenger business, as the District Court states; in other words, an apportionment of investment between freight and passenger service on basis of operating expenses. Neither the Commission nor the courts have ever countenanced any such method of apportionment. The reason is obvious, namely, that operating expenses, which include maintenance, bear no fixed relationship whatever to original cost (R. 1432, 1476).

3.

**The Commission's Denial of Appellants' Second Petition for Rehearing Was Not "Arbitrary." On the Contrary, This Denial Represented a Definite Finding of Worthlessness by the Commission, After Due Consideration, in the Same Cost Calculations Upon Which Appellants Are Here Again Relying.**

Although not specifically mentioned in the assignment of errors (R. 273), the point was urged before the District Court that the Commission "arbitrarily" denied appellants' second petition for rehearing, which petition was filed after the Commission had issued its Report on Reconsideration and its amended order (R. 79). The bill expressly alleges that in this second petition

> "confiscation was specifically alleged and supported by an elaborate study of revenues and estimated expenses incident to the handling of citrus fruit by northern and southern lines which petitioners requested an opportunity to present in evidence" (R. 16, 17).

It is further alleged that the Commission "arbitrarily and unreasonably declined even to comment upon or criticize this evidence as to estimated costs and denied the petition" (R. 17).

Rule XV of the Commission's Rules of Practice provides as follows:

> "(a) An application for further hearing in a proceeding before final submission, for reopening a proceeding after final submission, or for rehearing, reargument, or reconsideration after decision, must be made by petition, *stating specifically the grounds relied upon,* filed with the commission and served by the petitioner upon all parties or attorneys who appeared at the hearing, or oral argument if had, or on brief.

"(b) If the application be for further hearing before final submission, or for reopening the proceeding to take further evidence, *the nature and purpose of the evidence to be adduced must be briefly stated*, and it must appear not to be merely cumulative."

In one of the earliest cases ever decided by the Commission that body announced the following reasonable and proper rule of procedure to which it has since adhered, namely:

"While in its (the Interstate Commerce Act) administration we will always cheerfully and carefully examine and consider all applications for rehearings by a party to any proceeding decided by us who will point out any errors he may think we may have committed, either of law or of fact, with a view to their prompt correction, if found to exist, yet we will not in any proceeding direct a rehearing involving the expense to parties of appearing before us for a reargument of the case and the further consumption of time on our part, which belongs to the public, *unless satisfied that such reargument might have the effect of changing the result of what we have already done.*"

*Riddle, Dean & Co.* v. *Pittsburgh & Lake Erie R. Co.*, 1 I. C. C. 773, 774.*

In the instant case the hearings before the Commission were commenced on May 11, 1931, and continued thereafter intermittently until December 22, 1931. The record embraced 2,054 typewritten pages of testimony, with 358 documentary and statistical exhibits. Following the issuance of the original report and order, the case was reopened and reconsidered by the Commission upon the petition of the

*See also: *National Wholesale Grocers Asso.* v. *Director General*, 69 I. C. C. 669, 675; *McDonald Chocolate Co.* v. *Baltimore & O. R. Co.*, 155 I. C. C. 475, 480; *Whiteland Canning Co.* v. *P. C. C. & St. L. R. Co.*, 23 I. C. C. 92, 94; *Commercial Club of Omaha* v. *A. & S. Ry. Co.*, 19 I. C. C. 419; *Taylor Dry Goods Co.* v. *M. P. Ry. Co.*, 28 I. C. C. 309.

northern roads, the appellants here. The "only additional facts" which appellants at that time sought to have the Commission consider were received in evidence (R. 80). The Commission thereupon issued a second report in which every error that had been asserted by appellants was separately dealt with and overruled, with a full statement of the reasons for this action in each instance.

When appellants thereafter filed a second petition for rehearing before the Commission they set forth in that petition in affidavit form (as the bill itself expressly alleges) their computed unit costs per car mile of the citrus fruit transportation, together with the formula which was used in computing these alleged costs and a full explanation of this formula. Both the formula itself and the resulting unit cost figures thereby obtained and embodied in the petition are *precisely the same* formula and figures which were later set forth in the bill and offered before the District Court (R. 18, 1592) and which are again reproduced in appellants' brief on this appeal (Appellants' original brief, p. 87).

In their petition before the Commission, therefore, appellants were advancing and relying upon *the same computed "system average" car mile costs to which reference has hereinbefore been made.* When that petition was filed the record already before the Commission, together with the findings of fact which the Commission had already made and stated in its two reports, sufficiently demonstrated the utter unreliability of these so-called cost calculations.

In order to afford full opportunity for consideration of this second petition, the Commission postponed the effective date of its order for a period of thirty days. The southern roads, appellees here, filed a written reply to the petition (Reproduced at R. 132). In this reply the southern roads pointed out in detail, with appropriate page references to the record already before the Commission, the same fundamental and vitiating defects in appellants' cost calcula-

tions, together with the additional facts refuting the claim of confiscation as alleged, which the southern roads later showed before the District Court and which they are here again asserting on this appeal.

There can be no room, therefore, for any contention that the Commission's denial of this petition was "arbitrary." On the contrary, this denial was in strict conformity with the Commission's established rule that such petitions will be denied if the matters therein alleged *would cause no change in the Commission's original conclusions and decision* even if the case should be reopened. Pursuant to the same rule of procedure it follows that the real inference to be drawn from the denial of this petition, together with the circumstances under which it was presented and passed upon by the Commission, is that the Commission, as well as the District Court, has fully considered appellants' cost data offered as proof of the alleged confiscation, and has definitely refused to recognize any reliability in these compilations.

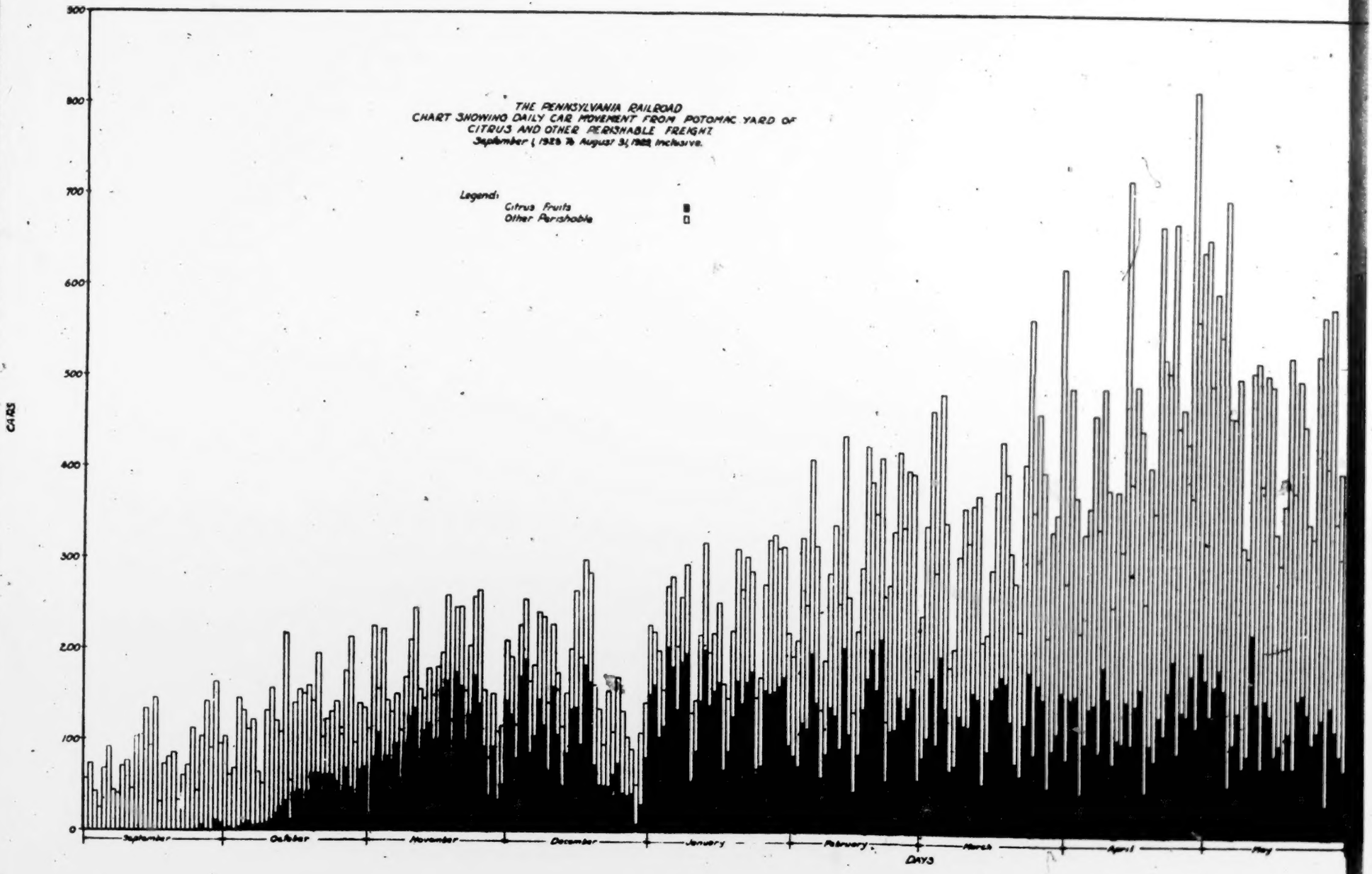
When the case was heard at Baltimore before the District Court testimony was taken in open court before the three judges (Circuit Judge Soper and District Judges Chesnut and Way) during an entire week. Most of this testimony was merely cumulative of the record previously made before the Commission. Every statistical exhibit was carefully scrutinized and the witnesses were subjected to most rigid examination by each member of the court. Upon consideration of the evidence, briefs, oral arguments and requested findings submitted by the respective parties, the court below reached the same conclusion which had obviously caused the Commission to deny appellants' second petition for rehearing. That conclusion was that appellants' cost data and other evidence fails to establish, even with any degree of approximation, the actual cost of the citrus fruit transportation.

Under these conditions the southern roads have felt justified in suggesting that upon such question purely of fact the concurrent conclusions of both the Commission and the District Court may safely be treated as final by this Honorable Court on appeal.

Respectfully submitted,

W. N. McGehee,
Charles Clark,
James F. Wright,
Frank W. Gwathmey,
*Attorneys for Atlantic Coast Line R. R. Co., et al., Appellees.*

February 25, 1936.


THE PENNSYLVANIA RAILROAD
CHART SHOWING DAILY CAR MOVEMENT FROM POTOMAC YARD OF
CITRUS AND OTHER PERISHABLE FREIGHT
September 1, 1928 To August 31, 1929 Inclusive.
Legend:
Citrus Fruits
Other Perishable
CARS
900
800
700
600
500
400
300
200
100
0
September
October
November
December
January
February
March
April
May
DAYS

I.C.C. Docket 24069-24160
Exhibit No.
Witness:

"B"

THE PENNSYLVANIA RAILROAD
SHOWING DAILY CAR MOVEMENT FROM POTOMAC YARD OF
CITRUS AND OTHER PERISHABLE FREIGHT
September 1, 1929 To August 31, 1932 Inclusive.

Legend:
Citrus Fruits
Other Perishable